CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 135. 1900, 31.

WILSON BROTHERS, A CORPORATION, AND JACOB KAHN, HENRY KAHN, JACOB WOHLBACH, COPARTNERS UNDER THE NAME OF KAHN BROTHERS & COMPANY, AND A. W. BECKER, HARRY L. MAYER, JOSEPH MAYER, AND HENRY B. MAYER, COPARTNERS UNDER THE FIRM NAME OF BECKER, MAYER & COMPANY, APPELLANTS,

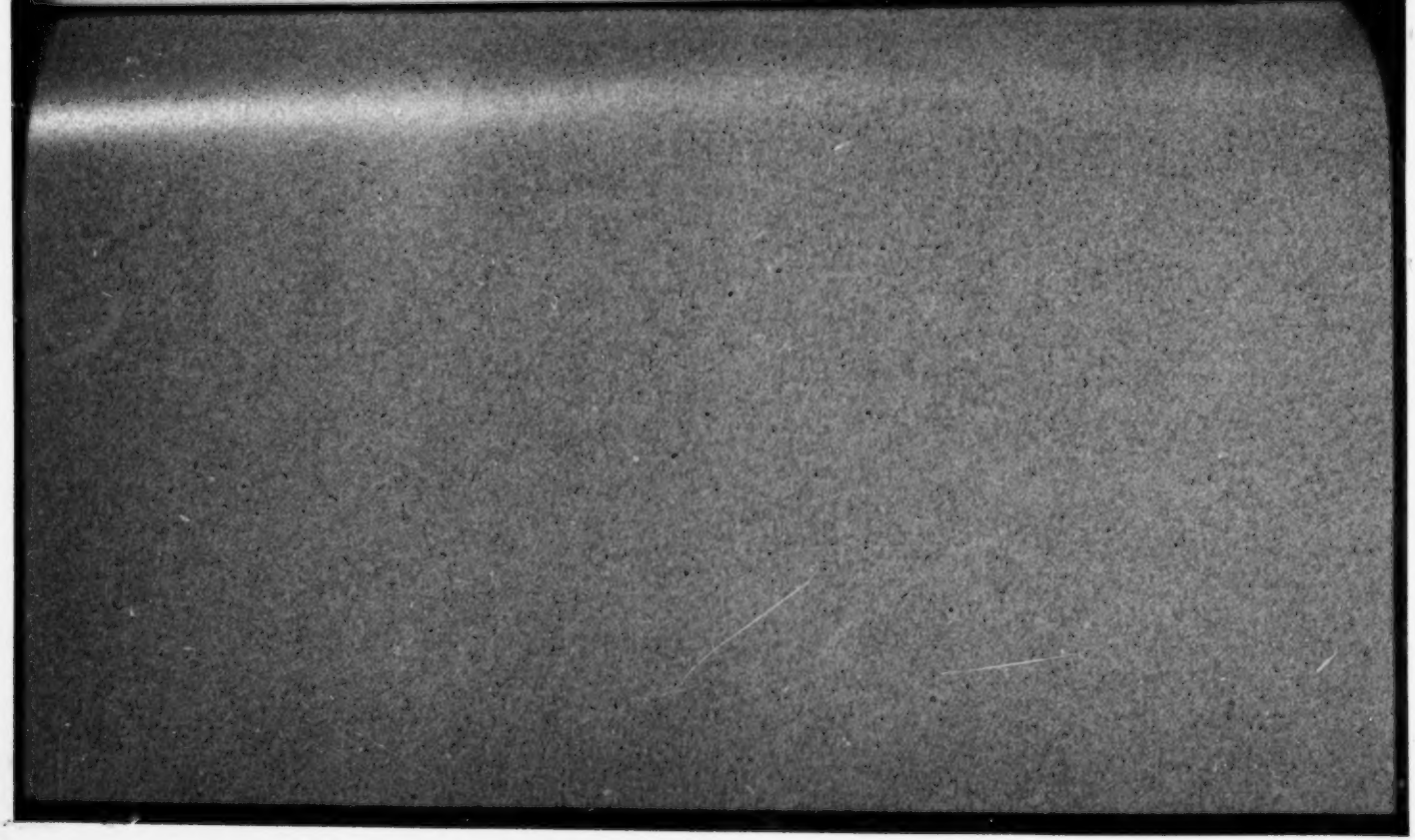
vs.

CASSIUS B. NELSON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED FEBRUARY 21, 1900.

(17,649.)



(17,649.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 535.

WILSON BROTHERS, A CORPORATION, AND JACOB KAHN, HENRY KAHN, JACOB WOHLBACH, COPARTNERS UNDER THE NAME OF KAHN BROTHERS & COMPANY, AND A. W. BECKER, HARRY L. MAYER, JOSEPH MAYER, AND HENRY B. MAYER, COPARTNERS UNDER THE FIRM NAME OF BECKER, MAYER & COMPANY, APPELLANTS,

vs.

CASSIUS B. NELSON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1900.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1898.

WILSON BROTHERS, a Corporation, and JACOB KAHN, Henry Kahn, Jacob Wohlbach, Copartners under the Name of Kahn Brothers & Company, and A. W. Becker, Harry L. Mayer, Joseph Mayer, and Henry B. Mayer, Copartners under the Firm Name of Becker, Mayer & Company, Appellants,
vs.
CASSIUS B. NELSON, Appellee.
} No. 617.

In the matter of Cassius B. Nelson, alleged bankrupt.

Mr. D. K. Tenney, Mr. F. W. Hall, Mr. John D. Erdall, Mr. Sam. Swanson, counsel for appellants.
Mr. William F. Vilas, Mr. Rob't M. Bashford, counsel for appellee.

Appeal from the district court of the United States for the western district of Wisconsin.

Transcript of record filed July 6, 1899.

Filed Aug. 28, 1899.

EDWARD M. HOLLOWAY, *Clerk.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1899, January Session, 1900.

In the Matter of CASSIUS B. NELSON, Bankrupt. No. 617, Original. In Bankruptcy.

In this case, duly argued and submitted to this court, there arise questions of law concerning which this court desires the instruction and advice of the Supreme Court of the United States.

On February 5, 1885, Cassius B. Nelson executed and delivered to Sarah Johnstone his promissory note in writing for the sum of $3,960, payable "five years or before after date," with interest, at the rate of four per cent. per annum, until paid. To this note was attached an irrevocable power of attorney, duly executed by the said Nelson under his hand and seal in the usual form, authorizing any attorney of any court of record in his name to confess judgment thereon after maturity of the note. This note was given for so much money at the time loaned to Nelson, and the interest on the note was paid from time to time up to the 1st day of November, 1898. Nelson was a trader and entered into business as such at the city of Madison, Wisconsin, soon after the giving of the note and carried on such business until his stock in trade was levied upon by the sheriff under execution as hereinafter stated. On the 1st day of November, 1898, Nelson, as he well knew, was and had long been insolvent, and thereafter continued

to be and is now insolvent, his liabilities largely exceeding his assets.

On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in the circuit court of the State of Wisconsin for the county of Dane against said Nelson upon the note and warrant of attorney aforesaid for the sum of $8,975, damages and costs, being the face of the note and $15 costs. Upon that judgment execution was immediately thereafter issued out of the court to the sheriff of that county, who thereunder and by authority thereof on the same day levied upon the stock and goods of Nelson, and thereafter and on the 15th day of December, 1898, sold the same at public auction and applied the proceeds thereof, to wit, the sum of $4,400, upon and in part payment of the judgment so rendered. This proceeding left the said Nelson without means to meet any other of his obligations. The judgment was so entered and the levy made without the procurement of Nelson and without his knowledge or consent. Such judgment was not subject to attack by Nelson and could not have been vacated or discharged by any legal proceedings which might have been instituted by him in that behalf, nor could the levy under the execution issued upon such judgment have been set aside or vacated by Nelson except by his filing his voluntary petition in bankruptcy prior to the sale and obtaining an
4 adjudication of bankruptcy thereunder, or by payment of the judgment. On the 10th day of December, 1898, creditors of the said Nelson of the requisite number and holding debts against him to the requisite amount filed their petition against the said Nelson in the district court of the United States for the western district of Wisconsin, sitting in bankruptcy, to procure an adjudication against him as a bankrupt. The act of bankruptcy therein alleged was in substance that while insolvent he suffered and permitted the said Sarah Johnstone, one of his creditors, to obtain preference upon his property through legal proceedings by the entry of the said judgment and the levy thereunder upon his stock of goods, and failed to vacate or discharge the preference obtained through such legal proceedings at least five days before the sale of the property under such judgment and execution. Upon issue joined the district court ruled that the said Nelson had not, by reason of the premises, committed an act of bankruptcy, and this ruling is before us for review.

The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

1. Whether the said Cassius B. Nelson, by failure to file his voluntary petition in bankruptcy before the sale under such levy, and to procure thereon an adjudication of bankruptcy, or by his failure to pay and discharge the judgment before the sale under such levy, committed an act of bankruptcy within the meaning of sec. 3*a*, subdivision (3), of the bankrupt act, 30 Stat., chap. 541.

2. Whether the judgment so entered and the levy of the execution thereon was a preference "suffered" or "permitted" by
5 the said Nelson within the meaning of clause (3) of sec. 3*a* of the bankrupt law.

3. Whether the failure of Nelson to vacate and discharg the preference so obtained, if it was one, at least five days before the execution sale, was an act of bankruptcy.

These questions the court on this day orders certified and submitted to the Supreme Court of the United States for its proper decision.

WM. A. WOODS.
JAS. G. JENKINS.
P. S. GROSSCUP.

February 10, 1900.

Endorsed on cover: File No., 17,649. U. S. C. C. of appeals, 7th circuit. Term No., 535. Wilson Brothers, a corporation, & Jacob Kahn, Henry Kahn, Jacob Wohlbach, copartners under the name of Kahn Brothers & Company, & A. W. Becker, Harry L. Mayer, Joseph Mayer, & Henry B. Mayer, copartners under the firm name of Becker, Mayer & Company, appellants, *vs.* Cassius B. Nelson. Filed February 21, 1900. (Certificate.)

No. 208. 31

Brf. of Tenney, Flower & Musgrave for Appts

Office Supreme Court U.S.
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JAN 7 1901
JAMES H. McKENNEY,
Clerk.

Filed Jan. 7, 1901.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 208.

WILSON BROTHERS, et al.,
Appellants,

vs.

CASSIUS B. NELSON,
Appellee.

On a Certificate from the United States Circuit Court of Appeals, for the Seventh Circuit.

BRIEF AND ARGUMENT FOR APPELLANTS.

DANIEL K. TENNEY,
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HARRISON MUSGRAVE,
Attorneys for Appellants.

Geo. Hornstein Co., Printers, Chicago.

IN THE

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No. 208.

WILSON BROTHERS, et al., *Appellants,*

vs.

CASSIUS B. NELSON, *Appellee.*

On a Certificate from the United States Circuit Court of Appeals, for the Seventh Circuit.

BRIEF AND ARGUMENT FOR APPELLANTS.

STATEMENT OF FACTS.

December 10, 1898, appellants, as creditors, filed their petition in the District Court of the United States, for the Western District of Wisconsin, asking that Cassius B. Nelson, appellee, be adjudicated a bankrupt. One of the acts of bankruptcy alleged was, that while insolvent, Nelson had suffered or permitted Sarah Johnstone, one of his creditors, to obtain a preference through legal proceedings, by the entry of a judgment against him, and the levy of an execution thereunder upon his stock of goods, he not having vacated or discharged the lien before the sale of the property under the execution. There was a hearing in the District Court upon issues formed on the petition, as amended, and after evidence taken the court (Judge Bunn) refused the adjudication and

dismissed the proceeding. The only opinion rendered was upon a preliminary motion to dismiss the original petition. (*In re Nelson*, 98 F. R., 76.) The questions now under consideration were, however, there passed upon and decided adversely to the petitioners. From the judgment finding that Nelson had not committed an act of bankruptcy, and dismissing the petition, the creditors appealed to the United States Circuit Court of Appeals for the Seventh Circuit, which court, without deciding the case, has certified here three of the questions involved for decision.

The facts as found by the certificate are as follows: February 5, 1885, Nelson, upon sufficient consideration, delivered to Sarah Johnstone, his judgment note for $8,960, payable five years, or before, after date, with interest at 4 per cent. Soon afterwards Nelson entered into business at Madison, Wis., and continued until November 21, 1898, when the Sheriff levied upon his stock of goods under the judgment entered by virtue of the power of attorney in this judgment note. Nelson, on November 1, 1898, and long prior thereto, had been insolvent, as he well knew; but the judgment was entered without his knowledge or consent, and the judgment and levy could have been vacated or discharged only by his filing his voluntary petition in bankruptcy or by the payment of the debt. The goods levied on were sold by the Sheriff under the execution.

The questions certified for the consideration of this court are as follows:

1. Whether the said Cassius B. Nelson, by failure to file his voluntary petition in bankruptcy before the sale under such levy, and to procure thereon an adjudication of bankruptcy, or by his failure to pay and discharge the judgment before the sale under such levy, committed an act of bankruptcy within the meaning of section 3a subdivision (3) of the Bankrupt Act, 30 Stat., Chap. 541.

2. Whether the judgment so entered and the levy of the execution thereon was a preference "suffered" or "permitted" by the said Nelson within the meaning of clause (3) of section 3a, of the Bankrupt Law.

3. Whether the failure of Nelson to vacate and discharge the preference so obtained, if it was one, at least five days before the execution sale, was an act of bankruptcy.

THE PROVISIONS OF THE BANKRUPT ACT OF 1898 BEARING ON THE QUESTIONS CERTIFIED, AND THE CORRESPONDING SECTIONS OF THE LAW OF 1867.

ACT OF 1898.

"Section 3. ACTS OF BANKRUPTCY: (*a*) Acts of bankruptcy by a person shall consist of his having * * * (3) *suffered or permitted,* while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference."

"Section 60. PREFERRED CREDITORS: (*a*) A person shall be deemed to have given a preference, if, being insolvent, he has *procured or suffered* a judgment to be entered against himself, in favor of any person, or made a transfer of any of his property, and the *effect* of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

"Section 67. LIENS: * * * (*c*) A lien created by, or obtained in, or pursuant to, any suit or proceeding at law, or in equity, including an attachment upon *mesne process, or a judgment by confession* which was begun against a person within four months before the filing of the petition in bankruptcy, by or

against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if (1) it appears that said lien was *obtained and permitted* while the defendant was insolvent, or that its existence and enforcement *will work* a preference, or (2) the party or parties to be benefited thereby, had reasonable cause to believe the defendant was insolvent, and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provision of this act.

"(*f*) That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt."

ACT OF 1867:

"Section 39: INVOLUNTARY BANKRUPTCY: That any person * * * who, being bankrupt, or insolvent, or in contemplation of bankruptcy or insolvency, shall * * * *procure or suffer* his property to be taken on legal process, *with intent to give a preference* to one or more of his creditors, * * * or with the intent by such disposition of his property to defeat or delay the operation of this Act, shall be deemed to have committed an act of bankruptcy."

"Section 35: PREFERENCES AND FRAUDULENT CONVEYANCES DECLARED VOID: That if any person, being insolvent or in contemplation of insolvency, within four months of the filing of the petition by or against him, *with a view to give a preference* to any creditor, or person having a claim against him, or who is under any liability for him, *procures* any part of his property to be attached, sequestered or *seized on execution,* or makes any payment, pledge, assignment, transfer or conveyance of any part of his property,

either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefitted thereby, or by such attachment, payment, pledge, assignment or conveyance, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of this Act, the same shall be void."

"Section 29: OF THE BANKRUPT'S DISCHARGE AND ITS EFFECT: That at any time after the expiration of six months from the adjudication of bankruptcy, * * * and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts. * * * No discharge shall be granted if the bankrupt * * * within four months before the commencement of such proceedings, *has procured* his lands, goods, money, or chattels to be attached, sequestered, or *seized on execution*."

BRIEF.

THE FAILURE OF NELSON TO VACATE OR DISCHARGE THE LIEN OF THE EXECUTION FIVE DAYS BEFORE THE SALE THEREUNDER, CONSTITUTED AN ACT OF BANKRUPTCY UNDER SEC. 3 (A), SUB. 3; AND THE THREE QUESTIONS CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE.

In re Reichman, 91 F. R., 624 (Adams, D. J., Mo. Feb. 17, 1899).

In re Moyer, 93 F. R., 188 (McPherson, D. J., Pa., April 12, 1899).

In re Cliffe, 94 F. R., 354 (McPherson, D. J., Pa., June 2, 1899).

In re Arnold, 94 F. R., 1001 (Evans, D. J., Ky., June 8, 1899).

In re Ferguson, 95 F. R., 429 (Brown, D. J., N. Y., May 16, 1899).

In re Rome Planing Mill, 96 F. R., 812 (Coxe, D. J., N. Y., Oct. 4, 1899).

Parmenter Mfg. Co. v. *Stover,* 97 F. R., 330 (Cir. Ct. of App., 1st Cir., Oct. 25, 1899).

In re Chapman, 99 F. R., 395 (Newman, D. J., Ga., Feb. 8, 1900).

Bear v. *Chase,* 99 F. R., 920 (Cir. Ct. of App., 4th Cir., Feb. 6, 1900).

In re Thomas, 103 F. R., 272 (Buffington, D. J., Pa., July 23, 1900).

In re Storm, 103 F. R., 618 (Thomas, D. J., N. Y., July 27, 1900).

In re Meyers, 1 Am. B. R., 1—1 Natl. B. N., 207 (Hotchkiss, Referee, N. Y., Apr. 1, 1899).

Collier on Bankruptcy, 3d Ed., p. 37.

ARGUMENT.

The learned District Judge said in his opinion in this case (98 F. R., 77), that, "to make the *entry of judgment* an "act of bankruptcy, there should be some fault on his (Nel-"son's) part by way of *procuring* or suffering the act to be "done. The case comes squarely within the decisions of "the Supreme Court in *Wilson* v. *Bank,* 17 Wall., 473, and "*Bank* v. *Warren,* 96 U. S., 539."

The act of bankruptcy complained of is not the *entry of judgment,* but Nelson's failure to *vacate or discharge the execution.* This could have been accomplished in either of two ways, by payment,

or by filing a voluntary petition in bankruptcy. The second method was easily within his power. His failure to use it authorized the court to adjudicate him a bankrupt upon the petition of creditors, and thus avoid the preference. It was not the entry of judgment, but the suffering of the sale under the execution, that established the preference.

The principal object of the act is to secure an *equal* distribution of an insolvent's property among his creditors (*Shawhan* v. *Wherrett*, 7 How., 627; *In re Richards*, 96 F. R., 936); and the act is not to be construed strictly, but liberally to effect this object and promote justice. (*In re Muller*, 3 N. B. Reg., 329; *In re Locke*, 2 N. B. Reg., 382; *In re Silverman*, 4 N. B. Reg., 523.)

The cases cited by Judge Bunn, *Wilson* v. *Bank*, and *Bank* v. *Warren*, are not in point. They were both decided under the law of 1867. They held that something more than passive non-resistance is necessary to establish the prohibited preference. But these decisions rest upon a construction of clauses in the act of 1867 essentially different from those in the Act of 1898. Section 39 of the Act of 1867 provided that any person who, being insolvent, shall "*procure*" or suffer his property to be taken on legal process, "*with intent to give a preference,* * * * shall be "deemed to have committed an act of bankruptcy." The corresponding section (3) in the Act of 1898 provides that an act of bankruptcy shall consist of having "*suffered or permitted,* while insolvent, any creditor to obtain a preference through legal proceedings and not having * * * vacated or discharged the preference." In the former act occurs the word "procure," used by Judge Bunn in his opinion; but in the present act the word is changed to "permit." The Act of 1867 required an "intent to give a preference." This element is entirely absent in the Act of

1898. That this requirement of an intent to prefer in the Act of 1867 was alone responsible for the two decisions referred to seems apparent from the language of Mr. Justice MILLER in *Wilson* v. *Bank*, as follows:

> "Though the main purpose of the 39th section is to define acts of the trader which make him bankrupt, and that of the 25th is to prevent preferences by an insolvent debtor in view of bankruptcy, both of them have the common purpose of making such preference void; and both of them make this to depend *on the intent* with which the act was done by the bankrupt. * * * It is, therefore, very strongly to be inferred that the act of suffering the debtor's property to be taken on legal process in Sec. 39 is precisely the same as procuring it to be attached or seized on execution in Sec. 35. * * * What, then, is the true meaning of that phrase in the act? In both cases it must be accompanied with *an intent*. * * * In both there must be the positive purpose of doing an act forbidden by the statute. The facts before us do not show any positive or affirmative act of the debtor's from which such intent may be inferred."

That it was the intention of Congress to eliminate the question of intent in reference to preferences, and make the effect of the transaction the controlling element, seems clear from an examination of the proceedings of the 55th Congress which passed the present law. Section 40 of the Lindsay Bill (which afterwards became the Henderson Bill), introduced in the Senate March 22, 1897, provided as follows:

"An act of bankruptcy by a person shall consist of his having * * * (5) made, while insolvent, a transfer of any of his property, or suffered any of it to be taken or levied upon, by process of law or otherwise, *for the purpose* of giving a preference; (6) *procured* or suffered a judgment to be entered against him, *with intent* to defeat his creditors."

The Nelson or Senate Bill had no provision for involuntary bankruptcy, but it provided in Section 4 that the bankrupt could not be discharged if within four months prior to filing the petition he had suffered any of his creditors to acquire a preference by legal proceedings. The House Bill and the Senate Bill went to a conference committee which agreed upon the bill substantially as it now exists, and the clause in the House Bill making it an act of bankruptcy if a person shall have "procured or suffered a judgment to be entered "against him, with intent to defeat his creditors," was changed so as to read as it now does in subdivision 3 of Section 3*a*, *i. e.*, the word "procured" and all reference to the intent of the insolvent were eliminated.

That the effect and not the intention of the act is the controlling element is shown also by Section 60, which provides that "a person shall be deemed to have given a preference if, "being insolvent, he has procured *or* suffered a judgment to "be entered against himself * * * and the *effect* of the "enforcement of such judgment * * * will be to enable "any one of his creditors to obtain a greater percentage of his "debt than any other of such creditors of the same class." Section 60 of the Henderson Bill (Cong. Rec., 55th Congress, p. 2042), for which this section is a substitute, made the *intent* of the insolvent essential to create a preference. Although the word "procured" occurs in Section 60 of the present law, it is separated by the disjunctive "or" from the word "suffered," and when we take this section as a whole it is apparent that the word was not used for the purpose of requiring any affirmative act or intent on the part of the insolvent as a necessary element of the preference. (*In re Meyers, supra.*)

That the question of intent has been purposely eliminated from the present act also appears from Section 67*c*, which

provides that a lien created under a judgment by confession or other legal proceedings, obtained within four months before filing the petition in bankruptcy, shall be dissolved by the adjudication of the debtor to be a bankrupt, if "it appears that said lien was obtained and permitted while the "defendant was insolvent, *or that its existence and enforcement will work a preference.*" Section 67*f* provides "that "all levies, judgments, attachments or other liens obtained "through legal proceedings against a person who is insolvent "at any time within four months prior to the petition in "bankruptcy against him, shall be deemed null and void in "case he is adjudged a bankrupt." These two subdivisions of Section 67 were construed by the Circuit Court of Appeals for the Seventh Circuit (*In re Richards,* 96 F. R., 935), and it was held that all liens obtained through legal proceedings against an insolvent debtor, within four months prior to the filing of a petition in bankruptcy by or against him, are annulled by his adjudication as a bankrupt, irrespective of the question whether the debtor suffered or permitted the lien to be obtained.

It clearly could not have been the intention of Congress to enable the insolvent to destroy the entire effect of Section 67 by simply refraining from filing a voluntary petition in bankruptcy and by suffering his goods to be sold under execution, leaving creditors powerless to take any proceedings in the bankruptcy court to avoid the preference. The learned Judge who wrote the opinion in the *Richards* case said the act "asserts the principle that as between creditors equality "is equity, and that the race of diligence must cease with "respect to legal proceedings against a person who is in-"solvent at the commencement of four months preceding "the filing of the petition." A construction of the act which would permit the diligent creditor to obtain a judgment note

and, after delaying four months, cause judgment to be entered thereunder and a levy made on all the property of the insolvent, and which would prevent creditors from taking action to obtain an adjudication in bankruptcy against the debtor in case he failed to take any steps to avoid the preference, would defeat the manifest object of the law. Insolvents who are about to fail nearly always wish to prefer their relatives or favorite creditors. To acquire a preference under the old law it was only necessary for the insolvent to give a judgment note and permit the creditor to have it entered four months after its date, and levy upon the debtor's property. Such a preference was easily obtained and entirely effectual. This was one of the very things the present law was enacted to prevent. The *giving* of a judgment note does not create a lien or preference. The value of such a note consists in that by virtue of the power of attorney therein the creditor may enter judgment at his will after maturity of the note without the knowledge or consent of the debtor, *i. e.* it enables the creditor to obtain a lien by immediate judgment, and levy of execution. Simply "permitting" or "suffering" the creditor to obtain such lien may not be an act of bankruptcy; but if the insolvent fails to vacate or discharge the lien of the execution at least five days prior to sale thereunder, and thus evinces his purpose to permit the lien to become an established preference, the act of bankruptcy results. It is apparent that if an insolvent actively assists a creditor through legal proceedings to obtain a preference he could not be expected ever to vacate or discharge it. He does not want it discharged. Therefore the words "permitted" and "suffered" can not have reference only to those debtors who actively procure the preference. The only sensible construction of the statute is, that when the affairs of an insolvent reach a point where some creditor

obtains a lien by legal proceedings, the debtor shall have until five days before the sale of the property to vacate the proceeding or discharge the lien by payment or by filing his voluntary petition in bankruptcy. If he be not able or willing to do either of these things his unpreferred creditors may resort to bankruptcy proceedings for the purpose.

In the *Meyers* case, *supra,* the learned referee, with much industry, has collected the provisions of the English and Canadian bankruptcy acts (which have abandoned the debtors' intent as a test), and has shown with great clearness that this clause of the act, so construed, "brings our legislation "on this important subject up to the level of the commercial "civilization of which we are a part."

The decisions in all cases so far decided, except the decision of Judge Bunn in this case, sustain the construction of this section of the statute for which we contend.

The first case decided was *in re Reichman,* 91 F. R., 624, in which an attachment had been levied upon the debtor's stock of goods without any participation on the part of the debtor. The debtor having failed to discharge the attachment lien, was upon petition of creditors, adjudged a bankrupt. The court (Adams, D. J.), without going exhaustively into the question, referred to the statute and said that the language of section 3 (a), subdivision 3, in its ordinary and natural meaning does not contemplate any actual participation or agency of the debtor; that he suffers or permits the act to be done if he allows it to be done or so conducts his business that a creditor has cause for attachment, and actually attaches; that unless the debtor discharges or vacates the attachment within five days before a sale, the act of bankruptcy becomes complete.

In the case of *Moyer,* 93 F. R., 188, a judgment had been entered upon a judgment note, and an execution levied

upon the goods of Moyer. The judgment was entered without his knowledge or consent, but he had no valid defense to the action. Judge McPherson stated that the question was one of importance, and gave it careful consideration. He held that the cases of *Wilson* v. *Bank*, 17 Wall., 473, and *Clark* v. *Iselin*, 21 Wall., 360, were not controlling, as the provisions of the act of 1867 on the subject were essentially different from those of the act of 1898; that the result of the legal proceedings taken against the debtor, and not his intention, was the controlling question; that if no other way to discharge the preference was available the insolvent "has "still at command one sufficient weapon of which he can "not be deprived. He can apply promptly to the court in "bankruptcy and ask that his property shall be ratably "divided among his creditors. If he fails to move, his action "is properly regarded as a confession that he is hopelessly "insolvent and as conclusive proof that he consents to the "preference that he has declined to strike down." The court called attention to the fact that the preference was obtained by the issuing of the execution and not by the giving of the judgment notes.

Judge Coxe, of the Northern District of New York, in the case of *Rome Planing Mill*, 96 F. R., 812, went into this question as a new one and carefully considered it. He held that under this section three things only were necessary to be proved; first, that a preference was obtained by a creditor through legal proceedings; second, that the debtor suffered or permitted the preference and did not vacate or discharge it at least five days before a sale or final disposition of the property affected; third, that the debtor was insolvent at the time the preference was obtained. He said:

> "The debtor's intent is not made an ingredient. It is enough that the creditor has obtained a preference and

that the debtor has permitted it to remain undischarged. What was the debtor's intent regarding the matter is wholly immaterial. It is not necessary that he should do any affimative act. If he remains passive and supine and permits his property to be taken by one creditor at the expense of the others, he has suffered or permitted a preferenc to be obtained."

In the case of *Parmenter Mfg. Co.* v. *Stoever*, 97 F. R., 330, the question was considered by Justices Holt, Putnam and Webb, of the Circuit Court of Appeals for the First Circuit. The case was one where the property of a corporation had been levied upon under an attachment writ. The point was raised that as the insolvent was a corporation and could not file a voluntary petition in bankruptcy, and thus defeat legal proceedings, it could not be said to have suffered or permitted the preference that ensued from them. The court said:

> "Regard, however, must be had to the whole of clause 3; and in view of that, what the appellant 'suffered' or 'permitted' was the sale of its property through legal proceedings. This was clearly the true act of bankruptcy within the contemplation of the statute, although the statute is somewhat awkwardly expressed."

In the case of *Thomas*, 103 F. R., 272, there were judgments entered upon judgment notes and levies thereunder upon the property of the insolvent. A petition for an adjudication in bankruptcy was filed alleging that the debtor had taken no steps to vacate or discharge the executions. On issue joined the commissioner to whom the case had been referred, reported that the executions were valid liens and the petition should be dismissed. The judgments were entered without the knowledge of the debtor. Judge Buffington overruled the commissioner, and held that the preference consisted not in the entry of the judgment, but the levy of the execution. He said:

> "Did the defendant, within the meaning of the Bankrupt Act, thereby suffer or permit a preference through legal proceedings? It is true she took no active affirmative steps to create such preference other than the failure to meet the matured judgment note or provide for its extension; but inasmuch as she took no steps to prevent the enforcement, by sale, of such preference, she must be held to have suffered or permitted these creditors to obtain preference."

The learned Judge then discusses the meaning of the words "permit" and "suffer," and the difference between these words and "procure," citing the case of *Gore* v. *Lloyd*, 12 Mees. & W., 497, and concludes that to permit or suffer implies no affirmative act, involves no intent. It is mere passivity, indifference, abstaining from preventive action. The court then refers to the difference between the present act and that of 1867, and says:

> "In conclusion, we may say, if judicial construction shall inject into this subdivision the element of intent which Congress must have purposely left out,—if it shall require the element of active participation and positive acts on the debtor's part, when Congress has said the negative, non-active passiveness of the debtor is the test,—then assuredly courts, rather than Congress, will in fact enact a bankrupt law. Moreover, if such be the construction, the practical result would be that an insolvent debtor has it in his power, by masterly inactivity,—by abstaining from filing a voluntary petition—to prefer his favored creditors, and, as a practical result, to permit a sale of his property within a few days, and its purchase by such creditors at a sacrifice price."

The other cases cited in our brief are practically to the same effect, although some of them bear upon the construction of other sections of the act.

To summarize: The prime object of the Bankrupt Law, from the standpoint of the creditor, is the avoidance of preferences and the equal distribution of the assets of insolvents under the protection of the bankruptcy courts and the uniform provisions of the act; from the standpoint of the debtor, the discharge of the honest bankrupt. Its purpose is to prevent all preferences after insolvency. The act does not contemplate that a creditor—diligent or favored—may obtain a lien, which the insolvent by his inaction may suffer to become an established preference. If so, the chief object of the law could be easily defeated. It may be asked: If a judgment be entered and levy made without the consent of the insolvent, where is he at fault, what act has he committed or suffered, what can he do? The answer is given by the cases cited. He should not permit his financial affairs to get in such a condition as to induce a creditor to enter judgment and to levy. If the levy be made, he should pay the debt; or make an arrangement with the creditor for an extension; or appeal to his other creditors for assistance. If none of these be possible or effective, he should voluntarily apply to the court of bankruptcy to take charge of his property and make an equitable and equal distribution. If he does not do this, what is the necessary conclusion? He "suffers or permits" the preference. When one is ill, though he may not have been responsible for the illness, he seeks a remedy. If not, and his disease be curable, he voluntarily endures, suffers, permits it. If Nelson had come upon this creditor in the act of breaking open and robbing his safe, and had looked on without preventing it, or calling for assistance, would he not have "suffered and permitted" the robbery? So, here, he stood by, saw this levy, advertisement and sale, and took no step to avoid this wrongful (in the eye of the Bankrupt Law) appropriation of his property.

Nelson committed an act of bankruptcy by suffering his property to be sold under execution, thus permitting Johnstone to obtain a preference through legal proceedings.

It is respectfully submitted that the three questions certified should be answered in the affirmative.

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No. 208.

WILSON BROTHERS ET AL., APPELLANTS,

vs.

CASSIUS B. NELSON, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF AND ARGUMENT FOR APPELLANTS.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

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CASSIUS B. NELSON, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Reply Brief and Argument for Appellants.

The first point stated by counsel for appellee is that "the judgment and levy were not a preference, nor suffered or permitted by appellee."

If there is any doubt as to what the word "preference," as used in the act, means, it should be solved, if possible, by the provisions of the act itself. We cannot agree, however, with counsel that one may not obtain a preference without being preferred *by the debtor.*

Counsel ingeniously confuses the expressions "obtaining a preference" and "being preferred." The latter expression ordinarily implies an act of the debtor; the former does not. Nothing is more common than to say one has obtained or acquired a preference by attachment, by entry of judgment and levy, or by filing a creditor's bill, in none of which proceedings does the debtor usually participate.

Sec. 3 (*a*), subd. 3, uses the words "suffered or permitted, while insolvent, any creditor to *obtain a preference* through legal proceedings." This is not equivalent to saying "any creditor who has *been preferred* by a debtor, while insolvent." But in order to remove any doubt as to what either expression means, as used in the act, sec. 60 (*a*) provides that any person shall be deemed to have given a preference if, being insolvent, he has suffered a judgment to be entered against him, *the effect of the enforcement* of which will be to enable one creditor to obtain a greater proportion of his debt than another—*i. e.*, obtain a preference. Here the question of participation or intent of the debtor is carefully eliminated. The meaning of the word "suffer" is made clearer by being used disjunctively with "procure." As opposed to procure, it implies inaction. The word "preference" is again used in section 67 (*c*), which provides that a lien obtained pursuant to a judgment by confession within four months of the filing of the petition shall be dissolved by the adjudication of bankruptcy if "it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and *enforcement will work a preference.*" Here again the result and not the intent is made the test. In the law of 1867 the words "procure or suffer" in every instance were coupled with the expression "with intent to give a

preference." But for the learned counsel's statement (Brief, p. 7) that "the preference now, as ever, is the *debtor's* preference of the *favored* creditor over others," we should have said the omission in each case of all reference to intent clearly showed the purpose of Congress to make that an immaterial element.

Assuming, however, the contention of counsel to be correct, the result is the same. Nelson knew this judgment note was outstanding ready to be used if circumstances warranted it. He knew he was hopelessly insolvent. The judgment note was not a lien. It simply gave the right of judgment without the usual process and notice. Nelson was under no obligation, legal or moral, to favor the holder. On the contrary, the bankrupt act imposed on him, after his hopeless insolvency, the obligation to treat all creditors alike. Yet he allowed his affairs to get in such a condition as to induce the judgment and levy. He thereby "suffered" the entry of the judgment. In *re* Reichman, 91 F. R., 624, the learned judge used this course of reasoning in reference to the levy of an attachment writ, and it applies with equal force here.

There is nothing in the argument that the intent of the debtor in the obtaining of a preference through legal proceedings is an essential element, for the reason that in the second act of bankruptcy, referring to a transfer of property, there is an express provision that the transfer must be with intent to prefer. A transfer of property may be, and generally is, in the usual course of business. The act defines its meaning as follows: "'Transfer' shall include the sale and every other and dieffrent mode of disposing of or parting with property, or the possession of property abso-

lutely or conditionally, as a payment, pledge, mortgage, gift, or security" (sec. 1 (25)). The payment of a matured account, in the course of business, has been held to be such a transfer and if made, during insolvency, and within four months of the filing of a petition in bankruptcy, to be a preference under sec. 60 (*a*) (Columbus Electric Co. *vs.* Worden, 99 F. R., 400; Cir. Ct. of App., 7th Cir., Jan. 25, 1900); from which it appears yet more clearly that the word "preference," as used in the act, has no necessary reference to the intent of the debtor. It is reasonable, however, that a transfer of property, being ordinarily in the usual course of business, should not be *an act of bankruptcy* unless made *with an intent* to prefer. But it is otherwise with the entry of a judgment, levy, and sale. Such acts are never in the usual course of business, but always indications of hopeless insolvency and the cessation of business.

As to the three cases decided by this court in construing the act of 1867, and so much relied upon by counsel, it is sufficient to say that they all rest on the express terms of the act making the debtor's intent an essential ingredient; and it is to be noted that none of them was a case involving the question as to what constituted an act of bankruptcy, but they were all cases where the assignee brought suit to recover property from third parties who, it was alleged, had been fraudulently preferred. Counsel say "there is nothing in the present act which any more than the former deprives the creditors of the ordinary remedies of law when in the pursuit of a lawful end against the debtor, without guilty collusion; or, which makes a judgment attained in such pursuit a preference; nothing, in short, which qualifies the force of the opinion quoted (Iselin *vs.*

Clark) so aptly to the point now in discussion." The fact is that the three cases cited could not possibly have been decided the same way under the present act, for this act expressly provides that "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as part of the estate of the bankrupt" (section 67 (*f*)). That these words are capable of but one construction, and render immaterial the intent of the debtor or the question of "preference," in the sense counsel for appellee use that word, is sufficiently established by high authorities (*In re* Richards, *supra;* Bear *vs.* Chase, 99 F. R., 920, Cir. Ct. of App., 4th Cir., February 6, 1900; *In re* Kenney, 105 F. R., 897, Cir. Ct. of App., 2d Cir., December 6, 1900).

Could there have been, we repeat, any object in making every such judgment and levy void, regardless of intent, and yet in requiring as essential to an act of bankruptcy an intent on the part of the insolvent in suffering such judgment to be entered?

II.

The second point made by the learned counsel is that "It is not an act of bankruptcy by an insolvent to refrain from voluntary bankruptcy."

It does not seem quite fair to state the proposition thus na-

kedly. The entry of judgment alone was not an act of bankruptcy. It was not even a lien or a preference. The levy created the lien and established the preference. The failure to vacate or discharge the lien completed the act of bankruptcy. The section does not speak of a preference by the entry of judgment, but "through legal proceedings," which include, of course, the levy and sale. When Nelson suffered his stock to be sold, or, more accurately, when he suffered the levy to stand undischarged up to the fifth day before sale, his act of bankruptcy was complete. He had thus permitted the preference to become established and evinced his purpose not to disturb it. The section must be construed as a whole. Whether he technically suffered or permitted the *entry of judgment* is not material. The true question is, did he suffer a preference through the legal proceedings of a judgment, levy, and impending sale, he taking no steps to avoid the consummation of such preference (Parmenter *vs.* Stoever, 97 F. R., 330).

We agree with counsel that mere insolvency, however great, does not warrant an adjudication of bankruptcy. Many a merchant has recovered from such a condition. It is the policy of the law to encourage this; but when the insolvent himself shows his intent to quit, suffers his property to be levied on and advertised for sale, and up to within five days of the sale makes no move to save himself, the law says he may be declared a bankrupt. The fairness and consistency of such a provision is too evident to require argument. The insolvent has given up the struggle, and the law steps in and says there must be an equal distribution. Equality is equity. The law cannot compel the debtor to file a petition in bank-

ruptcy; but where he has abandoned his property to fighting creditors the law very properly provides that an act of bankruptcy has arisen. Counsel criticise our statement that bankruptcy could be prevented by payment, saying the payment of a judgment would be a preference. This does not follow, for, as we have shown, a payment—*i. e.*, a transfer of property—is not an act of bankruptcy unless made with intent to prefer. The payment of a judgment by the debtor with the purpose to obtain possession of his property and business in good faith and pay his debts would not be within the statute. But payment is not the only recourse of an honest debtor under such circumstances. Experience teaches that it is easy for him in most cases to obtain a compromise or an extension, if he desires to continue business, and in this manner discharge the lien of the judgment.

Counsel say (Brief, p. 21): "There is not a line or word in the bankrupt act that vacates or discharges, or authorizes to be vacated or discharged, any judgment in any other court, lawfully entered before bankruptcy in a hostile proceeding against the bankrupt without his procurement or sufferance. Counsel point out none. * * * Their claim assumes only that *the lien* of the execution levied upon personal property will be dissolved. But were that correctly assumed it would not satisfy the statute, which is that the *preferential judgment* shall be vacated or discharged by the preferring or colluding debtor." Counsel overlook section 67 (*f*), which provides "that all levies, *judgments*, attachments, or other liens, *obtained* through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bank-

ruptcy against him shall be *null and void* in case he be adjudged a bankrupt." As we have stated, it has been held by the circuit courts of appeals in the 2d, 4th, and 7th circuits that any judgment so entered, irrespective of the debtor's procurement or intent, is rendered void by this section. Counsel criticise the Richards case, the one first decided on this point; but in view of the subsequent decisions following it, we need not argue the question here.

If, therefore, counsel are correct in saying that the general rule ought to be so limited that an insolvent's failure to file a voluntary petition five days before the execution sale shall be an act of bankruptcy in those cases *only* where the judgment would be avoided by bankruptcy (Brief, p. 21), this case has been brought clearly within such limitation.

Respectfully submitted.

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Brief for Appellee.

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NO. 208.

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Appellants,

vs.

CASSIUS B. NELSON,
Appellee.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

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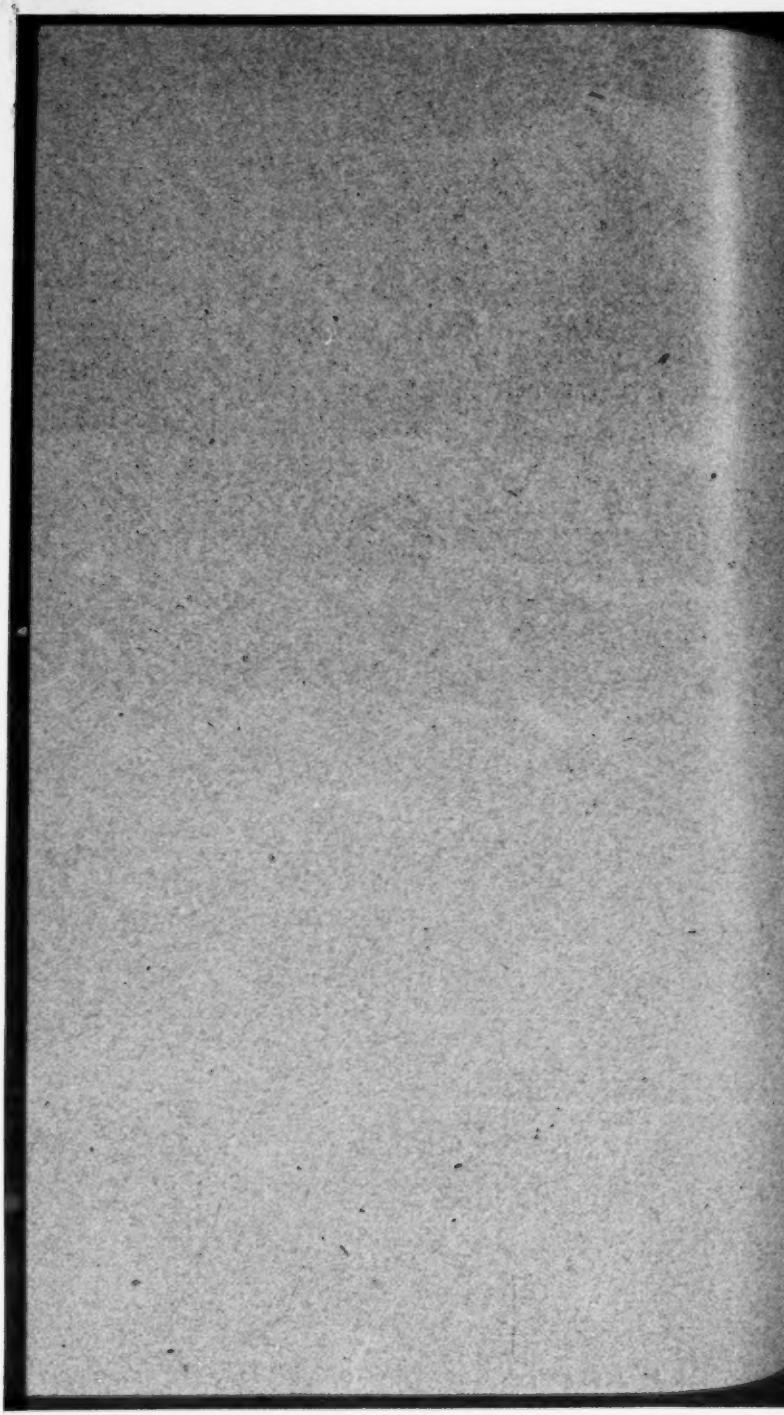

Supreme Court of the United States.

OF OCTOBER TERM, A. D. 1900.

No. 208.

WILSON BROTHERS, ET AL.,

Appellants,

vs.

CASSIUS B. NELSON,

Appellee.

On a Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR APPELLEE.

THE FACTS are clearly and fully stated in the certificate, and are few and simple.

As the original security for money loaned him Nelson gave, in 1885, his promissory note for $8,960, due in five years, with interest payable annually, and an irrevocable warrant of attorney authorizing any attorney of any court of record to confess judgment for the amount due upon the note at any time after maturity. Interest

was regularly paid until Nov. 1st, 1898. Upon this note and warrant of attorney, judgment was entered Nov'r 21st, 1898, execution issued, and his stock of goods levied upon and sold on the 15th of December following for $4,400. The judgment and levy were unassailable in law, and could not have been vacated or discharged by any legal proceedings, unless by his voluntary petition in bankruptcy. Nor had he other means sufficient to pay the judgment. Nelson had long been, in fact, insolvent, although he had continued in business. But the judgment was entered and levy made without his knowledge or consent; with no act or omission whatever on his part other than the giving of the warrant of attorney originally. The proceeding was purely an adversary one, by the creditor in the enforcement of her security.

The three questions certified for advice are:

1. Whether the said Cassius B. Nelson, by failure to file his voluntary petition in bankruptcy before the sale under such levy, and to procure thereon an adjudication of bankruptcy, or by his failure to pay and discharge the judgment before the sale under such levy, committed an act of bankruptcy within the meaning of sec. 3*a*, subdivision (3) of the bankrupt act, 30 Stat., chap. 541.

2. Whether the judgment so entered and the levy of the execution thereon was a preference "suffered" or "permitted" by the said Nelson within the meaning of clause (3) of sec. 3*a* of the bankrupt law.

3. Whether the failure of Nelson to vacate and discharge the preference so obtained, if it was one, at least five days before the execution sale, was an act of bankruptcy.

Two principles, both seemingly plain in law and reason, should govern, it is respectfully submitted, response to these questions:

1. ONE OUGHT NOT TO BE HELD GUILTY OF COMMITTING AN ACT OF BANKRUPTCY BECAUSE OF THE ACT OF ANOTHER DONE WITHOUT HIS KNOWLEDGE AND IN A HOSTILE PROCEEDING.

2. ONE OUGHT NOT TO BE HELD GUILTY OF COMMITTING AN ACT OF BANKRUPTCY BECAUSE HE DECLINES THE PRIVILEGE OF VOLUNTARILY BECOMING BANKRUPT.

A statute which denounced such a consequence in either case, would be oppressive and unjust. To construe a statute, which does not enact such consequences in explicit terms, so as to impose them by interpretation, seems juridically inconceivable.

The argument for the appellant seems to concede the first of these propositions, and to found its hope upon the second, yet asks an affirmative answer to all three questions. We contend that neither upon the fair meaning of the words employed by congress, nor upon just principles applicable to the legislation under consideration, can either consequence be inflicted.

I.

THE JUDGMENT AND LEVY WERE NOT A "PREFERENCE," NOR "SUFFERED OR PERMITTED" BY NELSON, THE APPELLEE.

Wilson v. City Bank, 17 Wall. 473.
Clark v. Iselin, 21 id. 360.
National Bank v. Warren, 96 U. S. 539.
McCaul v. Thayer 70 Ohio 138
Bank v. Shrenk 97 id 250

1. The word *preference*, as used in the statute, is a technical noun of the law, the meaning of which is well established and easy to reach. It implies a disposition of his property by an insolvent, or one in contemplation of insolvency, either through his own act or his conscious and purposed contribution to the act of a creditor, by which the particular creditor is given an advantage over other creditors. A preferred creditor is one whom *the debtor* has preferred, and his advantage is derived from *the debtor*, when contemplating general insolvency. A creditor is not preferred, who stipulates for security with the origination of the debt, although he thus assures himself advantage over other creditors, not secured, in case of the debtor's subsequent insolvency. Such a security, embraced in the original contract, is sacred in the law against violation or impairment.

Neither is a creditor preferred who, in adversary proceedings, avails himself against his delinquent debtor of the remedy which the law gives him, although by his diligence he thus secures an advantage which other

creditors not so active in their own interests, may not enjoy. His advantage is not the debtor's favor or act, but the gift of the law, whose aid he has rightfully invoked.

The meaning of the term is most readily seen from its use in the common law, which upheld preferences. Then, when lawful, the preferential acts of the debtor were unequivocal. He *intended* to give, and gave, specific advantages to favored creditors, and "preferences" and "preferred creditors" required no elucidation.

The meaning of preference, as used in the statute, remains the same; but since the thing is now forbidden, and yet is often collusively attempted, provision is made to discover and defeat the preferential purpose, even though skillfully concealed, especially when under the favorite guise of adverse, but in truth collusive, legal proceedings.

"A person shall be deemed to have given a preference if being insolvent, he has *procured or suffered* a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same ciass." §60, Bankrupt Act.

Here is the bankrupt act of 1867, in substance, with the rule enacted in terms that one must have intended the natural consequences of his intelligent acts, as a substitute for the phrase "with intent (or view) to give a preference." Nothing more.

To give a *preference* by judgment is none the less still the act of *the debtor*. To have procured it, imports that

he has taken actively some promotive step to obtain the the judgment. And what to suffer it? Necessarily some act, or some omission, equally intelligent, but rather of collusive submission than original promotion. To procure implies initiative by the debtor; to suffer, initiative by the creditor, but in either case, understanding of the steps taken to obtain the judgment, with conscious purpose on the part of the debtor. Desire might incite to procurement, willingness only induce sufferance; but the volition of the debtor, conscious, intelligent volition, is as essential to a preference in the one case as the other. And in the case of sufferance, it would seem also clear that this volition must have caused the debtor to refrain from doing something, which he might but for his willingness have otherwise done to prevent the result. It would be denial to a creditor of his legal right, not less than unjust imputation on the debtor, to hold him guilty of suffering what he could in no way resist.

The entry of judgment is, in no such case, imputable to the debtor.

See discussion in *Clark v. Iselin*, 21 Wall. 373-77.

2. There seems confusion of language and ideas between sec. 3*a*, subdivision (3), and sec. 60, of the Bankrupt Act; as well as in other parts of it.

The former requires that the debtor, in order to be guilty of an act of bankruptcy, must have *suffered or permitted* a *preference* and through *legal proceedings*. The latter defines the preference as a *judgment, procured or suffered*.

It must be then to have suffered or permitted the *judgment*, which constitutes the first step in the act of bankruptcy, since that is the particular legal proceeding which alone amounts to a preference.

Literally, pursuing the language of the statute, Nelson must have "suffered or permitted" his creditor to obtain a judgment which Nelson "procured or suffered" to be entered against himself.

The word "permit" implies somewhat more of active volition than the word "suffer." See distinction of synonyms in Webster's International Dictionary under *Permit*; and in the Century Dictionary under *Allow*. Unquestionably it in no manner extends the idea of a passive exercise of will, imported by the word "suffer." The act of 1898 goes no further, therefore, in this particular, than the act of 1867, in which "suffer" was the alternative verb employed to signify the character of the debtor's contribution to the preferential act and purpose; as it is here. In fact, in this act as in the earlier, "suffer" is collocated with procure; and thus, in both, the obvious meaning is carried, and plainly intended to be carried, of *the debtor's* conscious participation in the act by which the creditor secures his preference, and as well in the preferential purpose; in the one case by active promotion, in the other, by intelligent and contributive submission. The preference now, as ever, is *the debtor's* preference of the favored creditor over others.

Notwithstanding, therefore, that Congress has in the act of 1898 substituted the rule of effect for proof of *intent*, as an independent fact necessary to a fraudulent preference, under the act of 1867, there is not a word which diminishes the necessity now of showing,

in order to make out a preference, that the debtor is chargeable with *conscious* participation, although passive, in the proceedings resulting in judgment: with *intelligent volition* that it be entered against him.

No warrant lies in the statute for the monstrous proposition that one may be adjudged guilty of an act done by others without his knowledge, and of course without his participation or consent; that he may be held liable to the infliction of harmful consequences as if he had himself preferred a creditor, whose every act was, in truth, taken in hostility to him and, on his part, in utter ignorance of it, until complete.

The true purpose of Congress is made even more clear by the language employed in defining the second act of bankruptcy, which is the transfer of property "to one or more of his creditors *with intent to prefer* such creditors over his other creditors." Thus to give to a completed transfer the prohibited preferential character, proof of *intent to prefer* is explicitly made essential. But in the case of a preferential judgment, by which the creditor and debtor may more easily collude and hide the preferential purpose, the intent is left to stand only on the presumption from effect, when the debtor procures or suffers it to be entered; although the like presumption may also be drawn in case of a transfer. Yet it is obvious that the creditor gains no more, and the debtor's estate suffers no less, whether the preference be effected in one manner or the other. And can it be supposed that Congress meant that in one case there should be necessary a provable intent to prefer, but that in the other an absolute want of any knowledge of the transaction on

the part of the debtor should be enough? And yet that both should be characterized as *preferences by the debtor*, and, as such, acts of bankruptcy committed by him? Can there be doubt that the true meaning of the act is that in either form of giving a preference the debtor must intelligently participate?

The point must be deemed settled by the former judgments of this Court. In *National Bank v. Warren, supra*, the opinion began: "This action goes upon the theory that the mere non-resistance of a debtor to judicial proceedings against him, when the debt is due and there is no valid defense to it, is the suffering and giving a preference under the Bankrupt Act. This theory is expressly repudiated in the case of Wilson v. City Bank."

If not a sufferance when cognizant of the proceeding though helpless to resist, how much more plainly is it not, when the debtor is in entire ignorance of the hostile action, not only begun but consummated by his creditor before he receives intelligence of it?

3. Mrs. Johnstone did not become a preferred creditor, nor her judgment a preference, because she appealed to the law for the aid it proffered her to collect her just debt. The warrant of attorney, irrevocable by its terms, was a security for which she stipulated when she loaned her money. When did it lose its power, the power given by the law? To what other tribunal could she appeal, in what other manner invoke the aid of public law, for the restoration of her money? What provision in the Bankrupt Act deprived her of the remedy she pursued; what offered her any other?

It is enough to quote the language of this court, in a like case; *Clark v. Iselin*, 21 Wall. 373.

"The confession was not itself a judgment, but it authorized the defendants to cause a judgment to be entered without the knowledge of the debtors, and even against their protest. Was, then, the subsequent entry of the judgment, and the issuing of an execution thereon, followed by a levy on the debtor's goods, obtaining an unlawful preference? The court below thought it was, but such is not our opinion. It must be conceded that on the 30th day of April, when the defendants caused the judgment to be entered, the execution to issue, and the levy to be made, they knew that Dibblee & Co. were insolvent; but that knowledge is not of itself sufficient to invalidate the judgment and execution. A creditor may pursue his insolvent debtor to judgment and execution, with full knowledge of the insolvency, notwithstanding the provisions of the Bankrupt Act, provided the debtor does nothing to aid the pursuit. If there be no collusion between the debtor and the creditor, the ordinary remedies of the law are open to the latter." "In fine, there must be guilty collusion to constitute the fraudulent preference condemned by the statute." P. 375.

There is nothing in the present act which any more than the former deprives the creditor of "the ordinary remedies of the law" when in pursuit of a lawful end against his debtor, without guilty collusion; or which makes a judgment obtained in such pursuit a preference; nothing, in short, which qualifies the force of the opinion quoted so aptly to the point now in discussion.

And there it may be left. Indeed, counsel for appellants substantially, if not explicitly, concede this point of our brief; it is hoped, the argument shows advisedly.

II.

IT IS NOT AN ACT OF BANKRUPTCY BY AN INSOLVENT TO REFRAIN FROM VOLUNTARY BANKRUPTCY.

1. The statute itself, when correctly analysed, demonstrates the unsoundness of the contention to the contrary.

The learned counsel for the appellants, recognizing the soundness of the preceding views, begin their argument, after quoting from the opinion of District Judge BUNN, by this explicit statement: (pp. 6–7)

"The act of bankruptcy complained of is not the *entry of judgment*, but Nelson's failure to *vacate or discharge the execution*. This could have been accomplished in either of two ways, by payment, or by filing a voluntary petition in bankruptcy. The second method was easily within his power. His failure to use it authorized the court to adjudicate him a bankrupt upon the petition of creditors, and thus avoid the preference. It was not the entry of judgment, but the suffering of the sale under the execution, that established the preference." And see also their summary, pp. 16–17.

This theory loses sight of the statute in many particulars. As already shown, the statute confines a preference through legal proceedings to the procuring or suffering of a *judgment* alone. There is nothing in it such as the act of 1867 contained, in relation to his procuring or suffering "his property to be taken on le-

gal process," or "any part of his property to be attached, sequestered or *seized on execution*." It would, perhaps, aid appellants little if the statute went further, since in this case the levy, as well as judgment, was equally without Nelson's knowledge; as, indeed, their argument recognizes. But it is important to keep the exact limitations of the statute in view, in order to its correct interpretation.

This argument of appellants fails also to take cognizance of the definition prescribed of the act of bankruptcy under consideration.

The words are: The act of bankruptcy consists of having "(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference."

The statute does not make the insolvent guilty of an act of bankruptcy because he has failed to vacate or discharge any or every judgment against him, at least five days before a sale, etc. He must have been guilty of two sins, or of one sin and one default, to be within its terms. First, he must have suffered a *preferential* judgment to be entered against him; AND, secondly, must have failed to have "vacated or discharged such preference."

Obviously, therefore, if the judgment obtained against him were not a *preference*, he commits no act of bankruptcy by failing to vacate or discharge it; and if it be conceded that Nelson, by filing a voluntary petition, could have vacated the judgment of Mrs. Johnstone, [which is strenuously disputed] he cannot be held to

have committed an act of bankruptcy because he did not, since the judgment was not a preference. Counsel argue that his refusal to file a petition operated to give this judgment preferential effect, and they would thus supply, by relation or retroaction, the quality of purposed sufferance necessary to constitute the judgment a preference. But, manifestly, this confounds the statute; for it requires the Court to impute to the second sin necessary to the act of bankruptcy, when the first is wanting, all the consequences of both. When no preferential judgment exists, no duty to vacate arises; and to hold that non-performance, where no duty to perform exists, both operates to raise the duty and proves its breach, seems justly characterizable as a refinement of casuistry.

The fair, reasonable meaning of the statute, we respectfully submit, imputes the act of bankruptcy primarily to the *preference* which the debtor has given, rather than to his failure to vacate it; the latter being seemingly intended as an avenue of escape proffered to him from the bankruptcy otherwise consequent on having given a preference. It should be read, in just intendment, that to suffer a preferential judgment to be entered against him is an act of bankruptcy by an insolvent, which his creditors can avail themselves of, unless he shall protect them from its consequences by causing it to be vacated or discharged; the statute presuming that what he has caused he can in some way control. And it seems mere confusion of the statutory purpose, to maintain that the chief stress of the enactment lies in the second clause; the failure to withdraw the preference, rather than the sin of giving it. Still more inadmissible, that so fierce was the purpose of Congress in the second clause, that the failure to vacate or discharge a judgment which was hostilely obtained,

and in no wise preferential, is to operate both to impute the preferential character to it and to complete the second step of the act of bankruptcy; in short, to constitute in itself the entire sin for which involuntary bankruptcy may be adjudged, notwithstanding the explicit requirement of a preceding preference.

In illustration of the foregoing view, though not otherwise important to the point immediately under discussion, we are forced to question the correctness of the learned counsel for appellants in their proposed alternative method of an insolvent's escape from the consequences of a preferential judgment; by its payment. If an insolvent procure a judgment against himself in the purpose to give preference to a creditor, it would rather seem to confirm the preference to pay it; and although in one sense payment discharges a judgment, the statute has seemingly used the verb "discharged" in another sense, indicated by its collocation with "vacated;" implying that to escape the consequences of his having thus attempted to prefer his favored creditor, he must cause the judgment to be so "vacated or discharged" as to take from it the effect of benefiting that creditor; upon the assumption already suggested that the debtor must be able to control, in some way, the judgment he has procured or suffered to be entered against him. Payment of a preferential judgment would hardly be less than a transfer of property with intent to prefer the creditor, and thus of itself an act of bankruptcy under the second clause.

But in this case, Nelson could not pay, and did not attempt it; and the foregoing suggestion is now impor-

tant only as contributing to show the true meaning of the default which Congress has said shall constitute the second step in the act of bankruptcy here alleged.

This reasoning demonstrates from the statute itself, it is respectfully submitted, that it could not have been the purpose of Congress to make the debtor's refraining to file a voluntary petition an act of bankruptcy, upon which he should be adjudged involuntarily bankrupt. For, if the judgment were not a *preference*, the act imposes no duty on him to vacate or discharge it: and, if it were a preference, it must be because of collusion between creditor and debtor, in which case the debtor is presumed able to recall it, by causing the creditor to vacate the judgment; it being clear of course that the creditor can gain nothing by refusing it, because the judgment will be of no advantage to him, having been obtained by collusion; and therefore his failure to vacate it will complete the act of bankruptcy.

The "guilty collusion" necessary to a preference being proven, the power to vacate the judgment *must* exist between the colluding parties, and if not exerted, each takes the consequence befitting him, the debtor bankruptcy, the creditor loss of preference.

No necessity exists in such a case, for the debtor's voluntary petition, in order to his adjudication.

It will be seen also that this brings the definition of the third act of bankruptcy into harmony with the second, which is the *transfer* of property "*with intent to prefer.*" In that case, the preferential act has been finished by the transfer made, and the act of bankruptcy

is complete. In the third, the preferential act, though equally intended, has only been begun, and a *locus penitentiae* is given the insolvent whereby he may retrieve the false step, and thus, escaping bankruptcy, pursue such attempts as may be open to him, through the forbearance of creditors or otherwise, to restore his fortunes or himself administer his estate to a better advantage for his creditors' benefit, as well as his own.

2. It ought to be sufficient to demonstrate that Congress did not intend the failure to file a voluntary petition to constitute an act of bankruptcy, to observe that they have omitted so to provide. It would seem inadmissible to import into the statute an act of bankruptcy, which was not explicitly mentioned and defined. One cannot read the Act without recognition of the manifest intention of the legislature to be exact and particular in prescription of the offenses, or grounds, upon which the quasi-punitive judgment may be pronounced which not only inflicts the stigma of a bankrupt upon a resisting defendant, but withdraws from him all power to administer his estate himself. Especially ought this consideration to have weight, because of the history of the act of 1867, under which the same contention now presented was raised, upon similar reasoning, and this court held it repeatedly to be unwarranted. Legislation of this character ought not to be extended by implication, because, like acts imposing penalties in new cases, it deprives the citizen of rights which he otherwise possessed under the laws; and, though the remedial purposes of the act should be rather aided than straitened by inter-

pretation, this can be rightfully done only in the cases prescribed for its application.

Collyer on Bankruptcy, 3rd Ed. 23.

In re Empire Metallic Bedstead Co., 39 C. C. A. 372.

And the act itself shows the consideration of congress for those who may be unwilling to be judicially denounced as bankrupts, and the obvious intention that insolvency, however great, should not authorize such a judgment; for the fifth ground for the adjudication is, in terms, that the insolvent shall have "admitted in writing his inability to pay his debts *and his willingness to be adjudged a bankrupt on that ground*." The argument of the counsel for appellants is, that he shall be adjudged bankrupt because he is *not* willing to be so adjudged. The mere additional fact that a judgment has been entered against him gives no force to their contention, when entered in hostility to him and without his knowledge; because such a judgment is but a form of indebtedness beyond his control, and if congress had intended that to be an element in the case, it would have so declared it; a more forcible consideration since they have so declared in respect to any judgment to the entry of which he has given preferential aid.

3. It is the favorite argument of those who wish to find in a statute what the legislature has not enacted, to assert the "policy" of the legislature and ask the court to supply its failures to give that policy effect. So some district judges and officers have declared the "policy" of Congress in the act of 1898, to be to secure

to an insolvent's creditors the equal distribution of his estate among them. Similar argument was pressed upon this court to support the like contention under the act of 1867. But this court, pursuing no "policy" beyond the fair meaning of the language of the statute, arrived at conclusions which are even more strongly supportable, by the same reasoning, upon the act of 1898.

It distinguished first the provisions relating to voluntary bankruptcy from those relating only to involuntary bankruptcy, and held the "discrimination made by the act" between these cases "the first and most important consideration" demanding attention. 17 Wall. 480. In the former, the insolvent himself turns over his estate, seeking only for himself a discharge from his debts. In the latter, judgment is sought *in invitum*, and it was said: "But when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man, in short to place him in a position which may ruin him in the midst of a prosperous career, the precise circumstances or facts on which he is authorized to do this, should not only be *well defined in the law*, but *clearly established* in the court." It is well known to the court that any legislation permitting involuntary bankruptcy was with difficulty secured in the act of 1898, which first passed the Senate without such provisions, and that they were finally written in by the conference committee, and, though it be true that the debates and steps by which an act is passed are of little or no value to assist its interpretation, yet this history of the passage of the present act adds emphasis to the reasoning of the court upon the act of 1867, in its present application. Its

applicability also is strengthened, and the purpose of Congress to insist upon like ideas now clearly exhibited, by the language already referred to as defining the fifth act of bankruptcy, the *written* declaration of the insolvent's willingness.

This court next disposed of the argument, which had "received the assent of a large number of the district judges" that the failure of the debtor to file a petition established the preferential character of the judgment obtained against him, that the "grand feature" of the law was to secure equal distribution in all cases of insolvency, and hence it was the insolvent's legal duty to file a voluntary petition; by holding there was neither such moral duty, nor statatory duty; that it was the insolvent's right, which the construction claimed might often change from a privilege to a ruinous duty; that the contention, if sustained, would create another class of cases in favor of creditors, by inference, "where the debtor ought himself to go into court as a bankrupt and fails to do it;" and, finally, that it was an erroneous assumption that the law intended to cover *all cases* of insolvency, and the construction sought could "only be sustained by imputing to the general scope of the Bankrupt Act a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment." 17 Wall, 483—88.

Every feature of this sound reasoning, it needs no discussion to see, is equally applicable to the present act; but in some points with greater force. Especially that the act was not intended to extend to all cases of insolvency. Under the act of 1867, many and various acts of a debtor were defined as acts of bankruptcy, and if engaged in the principal avocations of business, the mere suspension of payment of commercial paper

for fourteen days was sufficient for adjudication. The present act allows practically but two causes as sufficient to warrant the adjudication against an unwilling insolvent, since one who has made a general assignment may be called willing, having divested himself voluntarily of his estate; and these two are, first, the disposition of his property in fraud of creditors, and, secondly, the giving a preference; the latter in two aspects, either as actually complete, or as attempted by a judgment and not recalled by its vacation.

If then, the argument from supposed "policy" was untenable under the act of 1867, by how much less is it worthy of consideration now? For Congress has not only more unmistakably marked the difference between voluntary and involuntary bankruptcy, but has very greatly enlarged the number of cases of insolvency in which creditors cannot proceed *in invitum*; cases in which this act, much more than the former, omits to "forbid all proceedings to collect debts in other courts, and in all other modes than by bankruptcy." 17 Wall. 485. In short, the policy of equal distribution was designed not for cases of insolvency but for cases of bankruptcy, not to be the law for governing the conduct of all insolvents, but only to control the administration of estates in the court of bankruptcy; and the estates of all insolvents, not by their own petition or upon proper adjudication brought within the jurisdiction of that court, remain subject to the operation of the laws, and the authority of courts, not relating to bankruptcy.

4 It is essential to the theory of appellants that the voluntary petition of an insolvent must have the effect

to vacate or discharge any and every judgment, although not preferential, entered within the four months previous. In any case when it will not, the debtor cannot be guilty of a default in not filing it, for which bankruptcy is denounced.

This essential appellants' counsel assume, by their summary statement that it was thus within Nelson's power to have vacated or discharged *the execution;* basing it on the doctrine held *In re Richards*, 37 C. C. A. 634; 96 Fed. 935, S. C.; that subdivision *c* of sec. 67 of the act is entirely extinguished by subdivision *f*, because of irreconcilable repugnancy between the two subdivisions, and the supremacy of the latter as the latest expression of legislative power.

At a later stage of the argument, attention will be briefly drawn to this question, and the proposition submitted that subdivision *c* is not so extinguished or repealed, but governs in all cases of voluntary bankruptcy. At this point, that will be assumed; and the following observations submitted upon that assumption.

If that be correct, the appellants' view of an insolvent's duty is clearly insupportable.

In the first place there is not a line or word in the bankrupt act that vacates or discharges, or authorizes to be vacated or discharged, any judgment in any other court, lawfully entered before bankruptcy in a hostile proceeding against the bankrupt without his procurement or sufferance. Counsel point out none, and offer no argument that any such power exists in the court of bankruptcy, or that any such consequence must be given in the court which rendered the judgment, by reason of the bankruptcy. Their claim assumes only that *the lien of the execution* levied upon personal property will be so dissolved. But were that

correctly assumed, it would not satisfy the statute, which is that the preferential *judgment* shall be vacated or discharged by the preferring or colluding debtor.

In the next place, the statute is very far from declaring that *all* execution liens shall be dissolved by the filing of a petition. (Counsel have twice misquoted it in their brief, p. 4 and p. 10, by inadvertence, having used the disjunctive "or" in place of the conjunctive "and.")

It declares only that liens "created by or obtained in or pursuant to any suit or proceeding at law or in equity, *including* an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy" which are impeachable upon one of three grounds of attack, shall be so dissolved. Sec. 67, subdivision *e*.

It will be noted, also, that no peculiar denunciation is aimed at judgments *by confession*, but only that they are included with judgments in any other manner obtained.

The three grounds upon which liens acquired by judgment may be dissolved, when proven to exist, are "(1) that said lien was obtained *and permitted*, while the defendant was insolvent *and* (not "or" as misquoted) that its existence and enforcement will work a preference, or, (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent *and in contemplation of bankruptcy*, or, (3) that such lien was *sought* and *permitted* in fraud of the provisions of this act."

The act of 1898 is not remarkably happy in the perspicacity of its language; but there seems little doubt

what these clauses must mean, especially, when read with other sections *in pari materia*. In the first clause, reference is undoubtedly made to the definition of the third act of bankruptcy in section 3 and of a preference in section 60, and the provision means that liens by *preferential* judgments shall be dissolved. Of the third clause, it is difficult to assign any other meaning, also; for it is not apparent how a lien could be, by a suit at law or in equity, "sought and permitted", that is to say, by collusion between creditor and debtor, which would be peculiarly "in fraud of the provisions of this act", except to give the creditor advantage in the nature of a preference. The second clause requires specific proof of the judgment creditor's reasonable cause to believe, etc., a fact to be independently found.

But, however, to be interpreted, these clauses clearly require, besides the fact of a judgment and execution levied, proof of additional facts chargeable upon the judgment creditor, in order to dissolve the lien he has obtained; and, of course, they must be established in a proceeding to which he shall be party and in which he shall be heard. It not only follows, therefore, that the filing of a voluntary petition will not dissolve all execution liens, but that it will dissolve none without a judicial inquiry in which the rights of another than the insolvent must be adjudged; in which such other must participate.

In such only, therefore, would it avail for the insolvent to file a petition; in such only, can it be justly said, upon appellants' own theory, that a duty to file it exists, the failure in which constitutes an act of bankruptcy.

The general rule which the appellants ask the court

to establish ought, therefore, to be so limited that the insolvent's failure to file a voluntary petition five days before the execution sale, shall be an act of bankruptcy in those cases *only* in which the court shall predetermine that upon a subsequent inquiry against the judgment creditor it will convict the latter of such complicity as shall cause the dissolution of the lien. To adjudge the insolvent guilty of this act of involuntary bankruptcy must, in every case, be done at the risk that if the judgment creditor shall, on inquiry against him, show that he is not within either of the three cases in which his lien may be dissolved, the adjudication will turn out to have been unjust. Further, it cannot but operate to prejudge, in some degree, the question to be afterwards tried when the judgment creditor shall be made a party to the inquiry against him; an obviously vicious method of judicial procedure.

This consequence attaches, of course, only when no case is made against the insolvent, as in the cause at bar, showing *him* to have committed any of the acts of bankruptcy defined by the statute. They relate to and illustrate the theory of appellants that when the insolvent has *not* procured or suffered a preferential judgment, when he has become a judgment debtor without his own knowledge but by the hostile act of a creditor, he may be made an involuntary bankrupt because he is *not* willing to become a bankrupt.

5. Nothing in the facts stated in the certificate warrants the assumption of appellants' counsel that Nelson could have vacated or discharged the judgment of Mrs. Johnstone, or even have caused the lien of her

execution to be dissolved, by filing his voluntary petition. Neither of the conditions specified in the statute for the dissolution of such a lien is shown by the certificate to be applicable to her lien.

It has been sufficiently argued that she obtained her judgment and levied her execution by a legitimate appeal to the only law or method of procedure open to her, in a hostile proceeding against her debtor, without his knowledge, procurement or sufferance. It was neither a permitted preference, nor was it sought or permitted in fraud of the provisions of the act. Nor does the certificate either contain direct statement or warrant just inference that she had reasonable cause to believe Nelson to be "insolvent and in contemplation of bankruptcy." Her resort to her security, given when she loaned her money, proves no knowledge of such facts as would charge her with reasonable cause to believe him insolvent, he then still continuing in business. And although the fact of insolvency is now known, the debtor was then assuredly not "in contemplation of bankruptcy." The meaning of that phrase is settled. "To render the security void, the debtor must have contemplated *an act of bankruptcy, or an application by himself to be decreed a bankrupt.*" *Buckingham vs. McLean*, 13 How. 167. The facts stated in the certificate negative the existence then of any such contemplation by Nelson. It is, indeed, the absence of such contemplation that the appellants complain of.

From these conclusions there seems no legitimate escape, if the rules prescribed by subdivision *c*, of sec. 67 are to prevail. For, in such case, it could have availed nothing for Nelson to file a voluntary petition.

The property levied on was then in custody of the sheriff. To recover it, or the proceeds of its sale, a suit

by the trustee would be necessary. *Bardes v. Hawarden Bank*, 178 U. S. 524. Upon the facts shown by the certificate, judgment must have gone for the defendant. The state court had proceeded according to law; nor could it refuse to the execution creditor the results obtained, or in awarding them be said to deny any right given by the law of the United States.

6. If sec. 67 be interpreted by its own terms there is seemingly no irreconcilable repugnancy between subdivisions *e* and *f*.

The former explicitly relates to a case in bankruptcy on petition filed "by or against" the bankrupt; the latter just as explicitly to a case on petition filed "against him"; and though some confusion may thus arise as to cases of involuntary bankruptcy, there seems in this no sufficient justification for expurgating from the statute an entire subdivision which Congress as surely enacted as it enacted the other; a conclusion in violation of that paramount canon of construction which requires the reconciliation of such differences wherever in any wise possible.

The argument from the first definition of phrases in section one seems not reasonably sufficient to overthrow the conclusion which must thus be reached by reading section 67 independently; because, first, the phrase defined is different, indicating only the person of the bankrupt by whichever initiation so adjudged, and, therefore neither applicable in terms, nor as a definition for mere convenience justly to be extended to other cases; and, secondly, the direct antithesis of phrases between subdivisions *e* and *f* in the section as written would seem

more likely to have been in the immediate contemplation of the legislature at the time than the supposed idea underlying a definition of such character, in a section not then in controversy, of a phrase which does not embrace the subject that is thus sought to be governed by it. The history of the preparation of this section by a conference committee tends still more to the supposition that the attention of the committee was limited to the section, rather than that it was purposed so to destroy a substantive subdivision intentionally retained as if comportable.

Arguments from supposed consequences are to be given, justly, but little weight in reading a statute; for it is not difficult to construct them on either side, and it is the wisdom of the legislature, such as it is, which rightfully controls. And it would seem more consonant with sound principles, when it becomes necessary to deal with a statute so hastily and unsatisfactorily written as this, rather to restrain its destructive effects than to suppose Congress intended to uproot by it all the vested rights which attach to judicial proceedings conducted honestly, without collusion, according to the law governing the matter than before the duly constituted courts of the land.

The reasoning of the opinion *In re O'Connor*, 95 Fed. 943, is worthy of careful attention, as giving effect to the rules of statutory construction long established and well grounded.

These suggestions are submitted with great deference, and without protracted discussion, inasmuch as the subject may be disregarded in the disposition of the

questions certified. For, as was well said by the learned and able circuit judge who wrote the opinion *In re Richards*, when speaking of the lien claimed upon a like judgment: "It is doubtless true that the debtor could not have been forced into bankruptcy because of the acts done by him."

And whatever may be the rule as to liens, it is here confidently submitted that this debtor, the appellee, ought not to be forced into bankruptcy for acts not done by him, but done against him; nor for his unwillingness to be stigmatized a bankrupt when he had committed no act of bankruptcy.

No review of adjudged cases is thought likely to be of any utility to the court. Those decided under the present act have been collated by counsel for appellants. There is but little discussion in them and the *ipse dixit* of any judicial officer requires no comment here.

Unless this Act of 1898, instead of being less grasping and severe than the Act of 1867, as is commonly understood to have been its purpose, shall be found to have proceeded on more trenchant and destructive ideas, the case is predetermined by the adjudications of this tribunal. That those adjudications are not less applicable

now than formerly, either upon attentive examination of the letter of the law, or a consideration of its purposes with similar breadth of wisdom, is confidently and respectfully submitted.

WILLIAM F. VILAS,
Counsel for Appellee.

R M. BASHFORD,
Appellee's Attorney.

Supreme Court of the United States.

No. 31.—October Term, 1901.

Wilson Brothers, a corporation, and Jacob Kahn, Henry Kahn, Jacob Wohlbach, copartners under the name of Kahn Brothers & Company, and A. W. Becker, Harry L. Mayer, Joseph Mayer, and Henry B. Mayer, copartners under the firm name of Becker, Mayer & Company, Appellants,

vs.

Cassius B. Nelson.

On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

The Circuit Court of Appeals for the Seventh Circuit certified to this court the following statement of facts and questions of law:

"On February 5, 1885, Cassius B. Nelson executed and delivered to Sarah Johnstone his promissory note in writing for the sum of $8960, payable 'five years or before after date,' with interest at the rate of four per cent per annum until paid. To this note was attached an irrevocable power of attorney, duly executed by the said Nelson under his hand and seal in the usual form, authorizing any attorney of any court of record in his name to confess judgment thereon after maturity of the note. This note was given for so much money at the time loaned to Nelson, and the interest on the note was paid from time to time up to November 1, 1898. Nelson was a trader, and entered into business as such at the city of Madison, Wisconsin, soon after the giving of the note, and carried on such business until his stock in trade was levied upon by the sheriff under execution as hereinafter stated. On November 1, 1898, Nelson, as he well knew, was and had long been insolvent, and thereafter continued to be and is now insolvent, his liabilities largely exceeding his assets.

"On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in the circuit court of the State of Wisconsin for the county of Dane against said Nelson upon the note and warrant of attorney aforesaid for the sum of $8975, damages and costs, being the face of the note and $15 costs. Upon that judgment execution was immediately thereafter issued out of the court to the sheriff of that county, who thereunder and by authority thereof on the same day levied upon the stock and goods of Nelson, and thereafter and on December 15, 1898, sold the same at public auction, and applied the proceeds thereof, to wit, the sum of $4400, upon and in part payment of the judgment so rendered. This proceeding left the said Nelson without means to meet any other of his obligations. The

judgment was so entered, and the levy made, without the procurement of Nelson and without his knowledge or consent. Such judgment was not subject to attack by Nelson, and could not have been vacated or discharged by any legal proceedings which might have been instituted by him in that behalf, nor could the levy under the execution issued upon such judgment have been set aside or vacated by Nelson, except by his filing his voluntary petition in bankruptcy prior to the sale and obtaining an adjudication of bankruptcy thereunder, or by payment of the judgment.

"On December 10, 1898, creditors of the said Nelson, of the requisite number and holding debts against him to the requisite amount, filed their petition against the said Nelson in the District Court of the United States for the Western District of Wisconsin, sitting in bankruptcy, to procure an adjudication against him as a bankrupt. The act of bankruptcy therein alleged was in substance that while insolvent he suffered and permitted the said Sarah Johnstone, one of his creditors, to obtain preference upon his property through legal proceedings by the entry of the said judgment and the levy thereunder upon his stock of goods, and failed to vacate or discharge the preference obtained through such legal proceedings at least five days before the sale of the property under such judgment and execution. Upon issue joined the District Court ruled that the said Nelson had not, by reason of the premises, committed an act of bankruptcy, and this ruling is before us for review.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

"1. Whether the said Cassius B. Nelson, by failure to file his voluntary petition in bankruptcy before the sale under such levy, and to procure thereon an adjudication of bankruptcy, or by his failure to pay and discharge the judgment before the sale under such levy, committed an act of bankruptcy, within the meaning of section 3*a*, subdivision (3), of the Bankrupt Act.

"2. Whether the judgment so entered and the levy of the execution thereon was a preference 'suffered' or 'permitted' by the said Nelson within the meaning of clause (3) of section 3*a* of the Bankrupt Law.

"3. Whether the failure of Nelson to vacate and discharge the preference so obtained, if it was one, at least five days before the execution sale, was an act of bankruptcy."

[December 9, 1901.]

Mr. Justice GRAY delivered the opinion of the Court.

On February 5, 1885, Nelson, in consideration of so much money then lent to him by Sarah Johnstone, executed and delivered to her his promissory note for the sum of $8960, payable in five years with interest until

paid. Attached to that note was an irrevocable power of attorney, executed by Nelson, in the usual form, authorizing any attorney of a court of record in his name to confess judgment thereon after its maturity. The interest on the note was paid until November 1, 1898. At that date Nelson, as he well knew, was, and long had been, and ever since continued to be, insolvent. On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in a court of Wisconsin upon the note and the warrant of attorney for the face of the note and costs. Upon that judgment, execution was issued to the sheriff, who on the same day levied on Nelson's goods, and on December 15, 1898, sold the goods by auction, and applied the proceeds thereof in part payment of the judgment. This proceeding left Nelson without means to meet any other of his obligations. The judgment was entered, and the levy made, without the procurement of Nelson, and without his knowledge or consent. The judgment and levy were unassailable in law, and could not have been vacated or discharged by any legal proceedings, except by his voluntary petition in bankruptcy. On December 10, 1898, a petition in bankruptcy was filed against Nelson; and the questions certified present, in various forms, the question whether Nelson committed an act of bankruptcy, within the meaning of section 3, cl. 3, of the Bankrupt Act of 1898.

In considering these questions, strict regard must be had to the provisions of that act, which, as this court has already had occasion to observe, differ in important respects from those of the earlier bankrupt acts. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Bryan* v. *Bernheimer*, 181 U. S. 188; *Wall* v. *Cox*, 181 U. S. 244; *Pirie* v. *Chicago Co.*, 182 U. S. 438.

In section 3 of the Bankrupt Act of July 1, 1898, c. 541, acts of bankruptcy are defined as follows: "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

In the first and second of these an intent on the part of the bankrupt, either to hinder, delay or defraud his creditors, or to prefer over other creditors, is necessary to constitute the act of bankruptcy. But in the third, fourth and fifth no such intent is required.

The third, which is that in issue in the case at bar, is in these words: "(3) suffered or permitted, while insolvent, any creditor to obtain a

preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference."

By the corresponding provision of the Bankrupt Act of 1867, any person who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, "procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors," "or with the intent, by such disposition of his property, to defeat or delay the operation of this act," was deemed to have committed an act of bankruptcy. Act of March 2, 1867, c. 176, § 39, 14 Stat. 536; Rev. Stat. § 5021.

The act of 1898 differs from that of 1867 in wholly omitting the clauses "with intent to give a preference to one or more of his creditors" or "to defeat or delay the operation of this act;" and in substituting for the words "procures or suffers his property to be taken on legal process," the words "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings," and not having, five days before a sale of the property affected, "vacated or discharged such preference."

There is a similar difference in the two statutes in regard to the preferences declared to be avoided.

The act of 1867 enacted that if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, "with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered or seized on execution," or makes any payment, pledge or conveyance of any part of his property, the person receiving such payment, pledge or conveyance, or to be benefited thereby, "or by such attachment," having reasonable cause to believe that such person is insolvent and that the same is made in fraud of this act, the same should be void and the assignee might recover the property. Act of March 2, 1867, c. 176, § 35, 14 Stat. 534; Rev. Stat. § 5128.

The corresponding provisions of the act of 1898 omit the requisite of the act of 1867, "with a view to give a preference."

Section 60 of the act of 1898, relating to "preferred creditors," begins by providing that "a person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 67, relating to "liens," provides, in subdivision c, as follows: "A lien created by, or obtained in, or pursuant to, any suit or proceeding

at law or in equity, including an attachment upon mesne process, or a judgment by confession, which was begun against a person within four months before the filing of the petition in bankruptcy, by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if (1) it appears that said lien was obtained and permitted while the defendant was insolvent, or that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act."

The same section provides, in subdivision f, "that all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt." This provision evidently includes voluntary, as well as involuntary bankrupts; for the first clause of the first section of the act, defining the meaning of words and phrases used in the act, declares that "'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition."

Taking together all the provisions of the act of 1898 on this subject, and contrasting them with the provisions of the act of 1867, there can be no doubt of their meaning.

The third clause of section 3, omitting the word "procure," and the phrase "intent to give a preference," of the former statute, makes it an act of bankruptcy if the debtor has "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings," and has not "vacated or discharged such preference" five days before a sale of the property. By section 60, he is "deemed to have given a preference" if, being insolvent, he has "suffered a judgment to be entered against himself in favor of any person," "and the effect of the enforcement of such judgment" "will be to enable any one of his creditors to obtain a greater percentage of his debt" than other creditors. By section 67, subdivision c, a lien obtained in any suit, "including an attachment upon mesne process, or a judgment by confession," begun within four months before the filing of the petition in bankruptcy, is dissolved by the adjudication in bankruptcy, not only if "such lien was sought and permitted in fraud of the provisions of this act," but also if "its existence and enforcement will work a preference." And by subdivision f of the same section "all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent," within the four months, shall be deemed null and void in case he is adjudged a bankrupt.

The act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact.

In the case at bar, the warrant of attorney to confess judgment was indeed given by the debtor nearly thirteen years before. But being irrevocable and continuing in force, the debtor thereby, without any further act of his, "suffered or permitted" a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, the effect of the enforcement of which judgment would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than other creditors; and the lien obtained by which, in a proceeding begun within the four months, would be dissolved by the adjudication in bankruptcy, because "its existence and enforcement will work a preference." And the debtor did not, within five days before the sale of the property on execution, vacate or discharge such preference, or file a petition in bankruptcy. By failing to do so, he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate.

The cases on which the appellee relies, of *Wilson* v. *City Bank*, 17 Wall. 473, *Clark* v. *Iselin*, 21 Wall. 360, and *National Bank* v. *Warren*, 96 U. S. 539, have no application, because they were decided under the act of 1867, which expressly required the debtor to have acted with intent to give a preference.

The case of *Buckingham* v. *McLean*, 13 How. 150, arose under the still earlier Bankrupt Act of August 19, 1841, c. 9, § 2. 5 Stat. 442. And the point there decided was that a power of attorney to confess a judgment was an act of the bankrupt creating a "security," which that bankrupt act in express terms declared void only if made in contemplation of bankruptcy and for the purpose of giving a preference or priority over general creditors.

The careful change in the language of all the provisions of the Bankrupt Act of 1898 from those of the former Bankrupt Acts upon the subject must have been intended by Congress to prevent a debtor from giving a creditor an irrevocable warrant of attorney which would enable him, at any time, during the insolvency of the debtor, and within four months before a petition in bankruptcy, to obtain a judgment and levy the execution on all the property of the bankrupt, to the exclusion of his other creditors.

The answer to the second and third questions certified must be that the judgment so entered and the levy of the execution thereon were a preference "suffered or permitted" by Nelson, within the meaning of clause 3 of section 3 of the Bankrupt Act; and that the failure of Nelson to vacate and discharge, at least five days before the sale on execution, the preference so obtained, was an act of bankruptcy; and it becomes unnecessary to answer the first question.

Second and third questions answered in the affirmative.

Supreme Court of the United States.

No. 31.—October Term, 1901.

Wilson Brothers, a corporation, and Jacob Kahn, Henry Kahn, Jacob Wohlbach, copartners under the name of Kahn Brothers & Company, and A. W. Becker, Harry L. Mayer, Joseph Mayer, and Henry B. Mayer, coparters under the firm name of Becker, Mayer & Company, Appellants,

vs.

Cassius B. Nelson.

On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[December 9, 1901.]

Mr. Justice Shiras dissenting.

On February 5, 1885, Cassius B. Nelson made and delivered to Sarah Johnstone his promissory note for the sum of $8,960, payable in five years, with interest at the rate of four cent per annum until paid. To this note was attached an irrevocable power of attorney, duly executed by said Nelson under his hand and seal in the usual form, authorizing any attorney of any court of record in his name to confess judgment thereon after maturity of the note. This note was given for so much money at the time loaned to Nelson. The interest on the note was paid from time to time up to the 1st day of November, 1898.

On November 21, 1898, Sarah Johnstone caused judgment to be duly entered in the circuit court of the county of Dane, State of Wisconsin, against said Nelson upon the note and warrant of attorney aforesaid for the sum of $8,975. Upon that judgment execution was immediately issued out of the court to the sheriff of that county, who levied upon the stock and goods of Nelson, and on December 15, 1898, sold the same at public auction and applied the proceeds thereof, to wit, the sum of $4,400, upon and in part payment of the judgment so rendered.

It is admitted that such a judgment note was, at the time it was made and delivered under the law of the State of Wisconsin, a legal and usual form of security for money loaned. (*McCall* v. *Thayer*, 70 Wis. 138; *Bank* v. *Shrank*, 97 Wis. 250.)

It is also admitted that the judgment was executed, and the levy made without the procurement of Nelson, and without his knowledge or consent, and that such judgment was not subject to attack by Nelson and could not have been vacated or discharged by any legal proceedings which might

have been instituted by him, nor could the levy issued under the execution have been set aside or vacated by Nelson, unless his filing his voluntary petition in bankruptcy prior to the sale, and obtaining an adjudication of bankruptcy thereunder would have had that effect, or by payment of the judgment.

On December 10, 1898, creditors of said Nelson filed a petition in involuntary bankruptcy against him in the District Court of the United States for the Western District of Wisconsin. The act of bankruptcy therein alleged was in substance that while insolvent he suffered and permitted the said Sarah Johnstone, one of his creditors, to obtain preference upon his property through legal proceedings by the entry of said judgment and the levy thereunder upon his stock of goods, and failed to vacate or discharge the preference obtained through such legal proceedings at least five days before the sale of the property under such judgment and execution. Upon issue joined, the District Court ruled that Nelson had not, by reason of the premises, committed an act of bankruptcy, and dismissed the petition. An appeal was taken to the United States Circuit Court of Appeals for the Seventh Circuit, and that court has certified certain questions for the consideration of this court.

The essential question in the case is whether, under the facts disclosed, Nelson was guilty of an act of bankruptcy in failing to file a petition in voluntary bankruptcy. This question must be answered in the negative if we respect previous decisions of this court in similar cases.

The subject was considered in *Buckingham* v. *McLean*, (13 How. 151.) The case arose under the Bankrupt Act of 1841, and it appeared that one John Mahard had (on April 7, 1842) executed a power of attorney to confess judgment in favor of Buckingham for $14,000; judgment was entered the next day; execution was issued April 20, and levy was made and sale of property, real and personal. On May 27, 1842, Mahard petitioned to be declared a bankrupt.

There were other questions in the case, but Mr. Justice Curtis, in his discussion of the question now before us, and speaking for the court, made the following observations:

"In many of the States, a bond and warrant of attorney to enter up a judgment is a usual mode of taking security for a debt, and judgments thus entered are treated as securities, and an equitable jurisdiction exercised over them by courts of law. In some States, they operate only as a lien on the lands of the debtor, in others on his personal estate also. (*Brown* v. *Clark*, 4 How. 4;) and wherever, by the local law, a judgment or an execution operates to make a lien on property, we are of opinion it is to be deemed a security; and when rendered upon confession, under a power given by the debtor for that purpose, it is a security, made or given by him within the meaning of the bankrupt act, and is void, if accompanied by the facts made necessary by that act to render securities void. These facts are, that the security was given 'in contemplation of bank-

ruptcy, and for the purpose of giving any creditor, endorser, surety or other person a preference or priority over the general creditors of such bankrupt.'

"The inquiry, whether this security was given in contemplation of bankruptcy, involves the question what is meant by these words? It is understood that, while the bankrupt law was in operation, different interpretations were placed upon them in different circuits. By some judges they were held to mean contemplation of insolvency—of a simple inability to pay as debts should become payable—whereby his business would be broken up; this was considered to be a state of bankruptcy, the contemplation of which was sufficient. By other judges it was held that the debtor was contemplating an act of bankruptcy, or a voluntary application for the bankrupt law. It is somewhat remarkable that this question should be presented for the first time for the decision of this court after the law has been so long repealed, and nearly all proceedings under it terminated. Perhaps the explanation may be found in the fact that when securities have been given within two months before a petition by or against a debtor, the evidence would usually bring the case within either interpretation of the law. However this may be, it is now presented for decision; and we are of opinion that, to render the security void, the debtor must have contemplated an act of bankruptcy, or an application by himself to be decreed a bankrupt.

"Under the common law, conveyances by a debtor to *bona fide* creditors are valid, though the debtor has become insolvent and failed, and makes the conveyance for the sole purpose of giving a preference over his other creditors. This common law right, it was the object of the second section of the act to restrain; but, at the same time, in so guarded a way as not to interfere with transactions consistent with the reasonable accomplishment of the objects of the act. To give to these words, 'contemplation of bankruptcy,' a broad scope and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced.

"The word bankruptcy occurs many times in this act. It is entitled 'An act to establish a uniform system of bankruptcy.' And the word is manifestly used in *other* parts of the law to describe a particular *status*, to be ascertained and declared by a judicial decree. It cannot be easily admitted that this very precise and definite term is used in *this* clause to signify something quite different. It is certainly true in point of fact that even a merchant may contemplate insolvency and the breaking up of his business, and yet not contemplate bankruptcy. He may confidently believe that his personal character, and the state of his affairs, and the disposition of his creditors, are such that when they shall have examined into his condition they will extend the times of payment of their debts and enable him him to resume business. A person not a merchant, banker, &c., and consequently not liable to be proceeded against and made a bankrupt though insolvent, may have come to a determination that he will not petition. The contemplation of one of these states, not being in fact the contemplation of the other, to say that both were included in a term which describes only one of them, would be a departure from sound principles of interpretation. Moreover, the provisoes in *this* section tend to show what was the real meaning of the first enacting clause. The object of these provisoes was to protect *bona fide* dealings with the bankrupt more than two months before the filing of the petition by or against him, provided the other party

was ignorant of such an intent on the part of the bankrupt as made the security invalid under the first enacting clause. And the language is: 'Provided, that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy or of the intention of the bankrupt to take the benefit of this act.' These facts, of one of which a *bona fide* creditor must have notice, to render his security void, if taken more than two months before the filing of the petition, can hardly be supposed to be different from the facts which must exist to render the security void under the *first* clause; or, in other words, if it be enough for the debtor to contemplate an act of insolvency it could hardly be required that the creditor should have notice of an act of bankruptcy or an intention to take the benefit of the act. It would seem that notice to the creditor of what is sufficient to avoid the security must deprive him of its benefits, and, consequently, if he must have notice of something more than insolvency, something more than insolvency is required to render the security invalid, and that we may safely take this description of the facts which a creditor must have notice of to avoid the security as descriptive also of what the bankrupt must contemplate to render it void.

"In construing a similar clause in the English bankrupt law, there have been conflicting decisions. It has been held that contemplation of a state of insolvency was sufficient. (*Pulling* v. *Tucker*, 4 B. & Ald. 382; *Poland* v. *Glyn*, 2 Dow. & Ry. 310.) But both the earlier and later decisions were otherwise, and, in our judgment, they contain the sounder rule. (*Fidgeon* v. *Sharpe*, 5 Taunt. 545; *Hartshorn* v. *Shodden*, 2 Bos. & Pul. 582; *Gibbons* v. *Phillips*, 7 B. & C. 529; *Belcher* v. *Brittie*, 10 Bing. 408; *Morgan* v. *Brandrett*, 5 B. & M. 297.) And see the opinion of Patterson, J., in the last case.

"Considering, then, that it necessary to show that the debtor contemplated an act of bankruptcy, or a decree adjudging him a bankrupt on his own petition, at what time in this case must he have had this in contemplation? He gave the power of attorney on the 7th of April; the judgment was confessed and entered up the next day; the execution was taken out and levied, and the lien created thereby on the 22d of May; and five days afterwards, being less than two months after the execution of the power, the debtor presented the petition under which he was decreed a bankrupt. The only act done by the debtor was the execution and delivery of the power of attorney. It was a security by him made or given only by reason of that instrument. What followed were acts of the creditors and of officers of the law, with which the debtor is no more connected than with the delivery by the creditor of a deed to the office of the register, to be recorded, or the act of the register in recording it. It would seem that if the *intent* of the debtor is to give a legal qualification to a transaction, it must be an intent accompanying an act done by himself, and not an intent or purpose arising in his mind afterwards, while third persons are acting; and, that consequently, we must inquire whether the debtor contemplated bankruptcy when he executed the power.

"It is true this contention would put it in the power of creditors, by taking a bond and warrant of attorney, while the debtor was solvent and did not contemplate bankruptcy, to enter up a judgment and issue execution, and by a levy acquire a valid lien, down to the very moment when the title of the assignee began. But this was undoubtedly so under the statute of James, which, like ours, contained no provision to meet this mis-

chief; and it became so great that, by the one hundred and fifth section of the revising act of 6 Geo. IV, it was enacted that 'no creditor, though for a valuable consideration, who shall sue out execution on any judgment obtained by default, confession or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid ratably with such creditors.' If the Bankrupt Act of 1841 had continued to exist, a similar addition to its provisions would doubtless have become necessary."

This suggestion of Justice Curtis was justified by provisions contained in the bankruptcy acts of 1867 and 1898, which enacted that liens obtained by attachments upon *mesne process*, or judgment by confession, within four months before the filing of the petition in bankruptcy, by or against the creditor, shall be dissolved by the adjudication of the debtor to be a bankrupt, if it appear that such a lien was *procured or suffered, obtained* and *permitted*, while the debtor was insolvent and contemplating bankruptcy, the party or parties to be benefited thereby having reasonable cause to believe that the debtor was insolvent and in contemplation of insolvency. But, as we shall presently see, such provisions do not affect the question before us now.

In *Wilson* v. *City Bank*, (17 Wall. 473,) decided under the provisions of the act of 1867, it was *held*, that something more than passive nonresistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property, when the debt is due and he has no defense; and that in such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the bankrupt law. In his opinion, discussing the facts of the case, Mr. Justice Miller said:

"There is nothing morally wrong in the course of the defendants in this matter. They were sued for a just debt. They had no defense to it, and they made none. To have made an effort, by dilatory or false pleas, to delay a judgment in the State court, would have been a moral wrong and a fraud upon the due administration of the law. There was no obligation upon them to do this, either in law or in ethics. Any other creditor whose debt was due could have sued as well as this one, and any of them could have instituted compulsory bankrupt proceedings. The debtor neither hindered nor facilitated any one of them. How is it possible to infer, logically, an actual purpose to prefer one creditor to another, or to hinder or delay the operation of the bankrupt act?

"It is said, however, that such an intent is a legal inference from such inaction by the debtor, necessary to the successful operation of the bankrupt law; that the grand feature of that law is to secure equality of distribution among creditors in all cases of insolvency, and that, to secure this, it is the legal duty of the insolvent, when sued by one creditor in an ordinary proceeding likely to end in judgment and seizure of property, to file himself a petition of voluntary bankruptcy, and that this duty is to be inferred from the spirit of the law, and is essential to its successful operation.

"The argument is not without force, and has received the assent of a large number of the district judges, to whom the administration of the bankrupt law is more immediately confided. We are, nevertheless, not satisfied of its soundness. We have already said that there is no moral obligation on the part of the insolvent to do this, unless the statute requires it, and then only because it is a duty imposed by law. It is equally clear that there is no such duty imposed by the act in express terms. It is, therefore, an argument solely of implication. This implication is said to arise from the supposed purpose of the statute to secure equality of distribution in *all cases* of insolvency, and to make the argument complete, it is further necessary to hold that this can only be done in bankruptcy proceedings under that statute. Does the statute justify so broad a proposition? Does it in effect forbid all proceedings to collect debts in cases of insolvency, in other courts, and in all other modes than by bankruptcy? We do not think that its purpose of securing equality of distribution is designed to be carried so far. As before remarked, the voluntary clause is wholly voluntary. No intimation is given that the bankrupt *must* file a petition under any circumstances. While his *right* to do so is without any other limit than his own sworn averment that he is unable to pay all his debts, there is not a word from which we can infer any legal obligation on him to do so. Such an obligation would take from the right the character of a privilege, and confer on it that of a burdensome and, often, ruinous duty. It is, in its essence, involuntary bankruptcy. But the initiation in this kind of bankruptcy is, by the statute, given to the creditor, and is not imposed on the debtor. And it is only given to the creditor in a limited class of cases. The argument we are combatting goes upon the hypothesis that there is another class given to the creditor by inference, namely, where the debtor ought himself to go into court as a bankrupt and fails to do it. We do not see the soundness of this implication from anything in the statute.

"We do not construe the act as intended to cover *all* cases of insolvency to the exclusion of other judicial proceedings. It is very liberal in the classes of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majority of cases, parties who are really insolvent to the chances that their energy, care and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy. Many find themselves with ample means, good credit, large business, technically insolvent, that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally enabled to pay all, and to save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankrupt court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business is not, of itself, to be construed an act of bankruptcy or a fraud upon the act.

"It is also argued that inasmuch as to lay by and permit one creditor to obtain judgment and levy on property necessarily gives that creditor a preference, the debtor must be supposed to intend that which he knows will follow. The general legal proposition is true, that where a person

does a positive act, the consequence of which he knows beforehand, that he must be held to intend those consequences. But it cannot be inferred that a man intends, in the sense of desiring, prosecuting or procuring it, a result of other persons' acts, when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them.

"Argument confirmatory to these views may be seen in the fact that all the other acts or modes of preference of creditors found in both the sections we have mentioned, in direct context with the one we have considered, are of a positive and affirmative character, and are evidences of an active desire or wish to prefer one creditor to another. Why, then, should a passive indifference and inaction, where no action is required by positive law or good morals, be construed into such a preference as the law forbids? The construction thus contended for is, in our opinion, not justified by the words of either of the sections referred to, and can only be sustained by imputing to the general scope of the bankrupt act a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment."

The principles of this case were approved and applied in *Clark* v. *Iselin*, (21 Wall. 360,) where it was held that the giving by a debtor, for a consideration of equal value, passing at the time, of a warrant of attorney to confess judgment, is not an act of bankruptcy, though such warrant or confession be not entered of record, but to be kept as such things usually are, in the creditor's own custody, and with their existence unknown to others; that the creditor may enter judgment of record thereon when he pleases, even upon insolvency apparent, and issue execution and sell; and that his action is valid and not in fraud of the bankrupt law, unless he is assisted by the debtor.

The facts of that case were, in respect to the question before us, similar to those of the present. In the opinion Mr. Justice Strong, after citing with approval *Wilson* v. *City Bank*, said:

"Now, in a case where a creditor, holding a confession of judgment perfectly lawful when it was given, causes the judgment to be entered of record, now can it be said the *debtor* procures the entry at the time it is made? It is true the judgment is entered in virtue of his authority, an authority given when the confession was signed. That may have been years before, or, if not, it may have been when the debtor was perfectly solvent. But no consent is given when the entry is made, where the confession becomes an actual judgment, and when the preference, if it be a preference, is obtained. The debtor has nothing to do with the entry. As to that he is entirely passive. Ordinarily he knows nothing of it, and he could not prevent it if he would. It is impossible, therefore, to maintain that such a judgment is obtained by him *when* his confession is placed on record. Such an assertion, if made, must rest on a mere fiction. And so it has been decided by the Supreme Court of Pennsylvania. (*Sleek* v. *Turner's Assignee*, Legal Intelligence, Sept. 25, 1894.)

"More than this, as we have seen, in order to make a judgment and execution against an insolvent debtor a preference fraudulent under the

law, the debtor must have procured them with a view or intent to give a preference, and that intent must have existed when the judgment was entered. But how can a debtor be said to intend a wrongful preference at the time a judgment is obtained against him when he knows nothing of the judgment? That years before he may have contemplated the possibility that thereafter a judgment might be obtained against him; that long before he may have given a warrant of attorney to confess a judgment, or by a written confession, as in this case, have put it in the power of his creditor to cause a judgment to be entered against him without his knowledge or subsequent assent, is wholly impertinent to the inquiry whether he had in view or intended an unlawful preference at a later time, at the time when the creditor sees fit to cause the judgment to be entered. For, we repeat, it is a fraudulent intent existing in the mind of the debtor at this later time which the act of Congress has in view. The preference must be accompanied by a fraudulent intent, and it is that intent that taints the transaction. Without it the judgment and execution are not void. . . .

"It has been suggested, in opposition to the view we have taken, that if a creditor may hold a confession of judgment by his debtor, or a warrant of attorney to confess a judgment, without causing it to be entered of record until the insolvency of the debtor appears, the debtor may thereby be able to maintain a false credit. If this be admitted, it is not perceived that it has any legitimate bearing upon the question before us. The bankrupt act was not aimed against false credits. It did not prohibit holding judgment bonds and notes without entering judgments thereon until the debtors became embarrassed. Such securities are held in some of the States, amounting to millions upon millions. The bankrupt act had a very different purpose. It was to secure equality of distribution of that which insolvents have when proceedings in bankruptcy are commenced and of that which they have collusively with some of their creditors attempted to withdraw from ratable distribution with intent to prefer some creditors over others."

Similar views prevailed in *National Bank* v. *Warren*, (96 U. S. 539,) where it was held that the mere non-resistance of a debtor to judicial proceedings in which a judgment was rendered against him, when the debt was due and there was no valid defense to it, it is not the suffering and giving a preference under the bankrupt act, and that the judgment is not avoided by the facts that he does not file a petition in bankruptcy, and that his insolvency was known to the creditor.

As, then, the power of attorney given by Nelson to Mrs. Johnstone was a valid security, customary under the law of Wisconsin, as it was given long before the passage of the Bankrupt Act of 1898, and, therefore, necessarily without regard to the provisions of that act and without any intention to prevent or defeat their operation, and as the entry of the judgment and the levy of the execution are conceded to have been without the knowledge or consent of Nelson, it is undeniable that, under the provisions of the Bankrupt Act of 1867, and within the principles laid in *Buckingham* v. *McLean*, *Wilson* v. *City Bank*, *Clark* v. *Iselin*, and *National Bank* v. *Warren*,

Nelson was under no obligation, legal or moral, to bring upon himself the ruin necessarily occasioned by a decree of bankruptcy, by filing a voluntary petition, and that the questions certified to us by the Circuit Court of Appeals should be answered in the negative.

But it is claimed that, having regard to the phraseology of the act of 1898, and although the warrant to confess judgment was given by the debtor before the passage of that act, yet being irrevocable and continuing in force, the debtor thereby, without any further act of his, suffered or permitted a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, and that he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate, by failing to file a voluntary petition.

Such a contention, in view of the various decisions of this court and hereinbefore cited, could not have been heretofore maintained, and it is, therefore, imperative that those who now urge it should be able to point to some clear and unmistakable declaration in the existing statute. So important a change in the policy of the bankrupt law must be manifested by explicit language, and cannot be safely and with due regard to sound principles of interpretation, made to depend upon conjecture and inference based upon a mere difference in phraseology between the present and prior acts of bankruptcy. In other words, the question before us must be decided by a consideration of the language actually used in the act of 1898, interpreted in the light of the previous decisions of this court.

We are concerned, in the present case, with section 3 of the act of 1898, which deals with and describes acts of bankruptcy. The section is headed "Acts of Bankruptcy," and then sets forth what are deemed to be acts of bankruptcy, as follows:

"Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2), transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3), suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4), made a general assignment in further benefit of his creditors; or (5), admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

It is obvious that Congress here had in view voluntary acts of the debtor —"*acts* of bankruptcy by a person." Concededly clauses 1, 2, 4 and 5 require an affirmative and voluntary act. It would naturally be presumed that the same quality of act would be required by clause 3. The section

consists of a single sentence, in which the several clauses all depend upon the leading phrase, "acts of bankruptcy shall consist of having done the several things enumerated in the dependent clauses." An act is defined in the Century Dictionary as "an exertion of energy or force, mental or physical; anything that is done or performed; a doing or deed; an operation or performance." And in the same work "an act of bankruptcy" is defined to be "an act the commission of which by a debtor renders him liable to be adjudged a bankrupt." In Anderson's Law Dictionary the word "act" is defined to be "a thing done or performed; the exercise of power; an effect produced by power exerted;" and it is said, "'Act' and 'intention' may mean the same as 'act' alone, for act implies intention, as in the expression 'death by his own act or intention.'"

Black's Law Dictionary describes "an act" as follows: "In a more technical sense, it means something done voluntarily by a person, and of such a nature that certain legal consequences attach to it. Thus a grantor acknowledges a conveyance to be his act and deed, the terms being synonymous."

Independently of dictionary definitions, it may be safely said that, in common usage and understanding, the word "act" signifies something done voluntarily, or, in other words, the result of an exercise of the will.

In view, then, of the plain meaning of the language of the clause and of its association, in the section, with other acts which require affirmative and voluntary proceedings on the part of the debtor, it would seem to be clear that mere failure by a debtor, even if insolvent, to file a voluntary petition in bankruptcy, is not, in itself, under the facts conceded to exist in this case, an "act of bankruptcy."

Indeed, it seems quite clear that if section 3 of the act of 1898 had been the first enactment by Congress on the subject, no one would ever have suggested the contrary view. The contention is mainly, if not wholly, founded on the omission of several words used in the previous statutes, or rather in the substitution of different words in section 3 for those used in the corresponding sections of the earlier laws. Those changes may be made best to appear by presenting them in parallel columns:

Act of 1867:	Act of 1898:
Sec. 39. That any person . . . who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall *procure* or *suffer* his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or with the intent by such disposition of his property to defeat or delay the opera-	Sec. 3. Acts of bankruptcy by a person shall consist of his having . . . *suffered* or *permitted*, while insolvent, any creditor to obtain a *preference* through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference.

tion of this act, shall be deemed to have committed an act of bankruptcy.

SEC. 35. That if any person, being insolvent or in contemplation of insolvency, within four months of the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or is under any liability for him, procures any part of his property to be attached, sequestered or seized on execution, or make any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment or conveyance, or to be benefited thereby, or by such attachment, payment, pledge, assignment or conveyance, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of this act, the same shall be void.

SEC. 29. . . . No discharge shall be granted if the bankrupt . . . within four months before the commencement of such proceedings, *has procured* his lands, goods, money or chattels to be attached, sequestered or seized on an execution.

SEC. 60. A person shall be deemed to have given a preference, if, being insolvent, he has *procured* or *suffered* a judgment to be entered against himself, in favor of any person, or *made a transfer* of any of his property, and the effect of the enforcement of such judgment or transfer will be to *enable* any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

SEC. 67. . . . A lien created by, or obtained in, or pursuant to, any suit or proceeding at law, or in equity, including an attachment on mesne process, or a judgment by confession, which was begun against a person within four weeks before the filing of the petition in bankruptcy, by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if it appears that said lien *was obtained and permitted* while the defendant was insolvent, and that its existence and enforcement will work a preference, or the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent, and in contemplation of bankruptcy, or that such lien was sought and permitted in *fraud* of the provision of this act.

That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt.

It having been repeatedly ruled, in the cases cited, that, under these provisions of the act of 1867, no person shall be deemed guilty of an act of bankruptcy except by reason of some affirmative and intentional act intended to defeat the purposes of the act, and that failing to file a voluntary petition in bankruptcy where a creditor is pursuing, in a State court, a lawful remedy on a lawful security given and received before the act of bankruptcy was passed, and without any knowledge or consent by the

debtor to such suit or proceeding, is not an act of bankruptcy, it is now contended that a different conclusion must be reached under the provisions of the act of 1898.

Examination and comparison of the above contrasted provisions will show, as I think, that no change was made by the latter enactment in the vital and decisive purpose that no person shall be visited with the penalty of involuntary bankruptcy unless he has brought himself within the denunciation of the law by some intentional and voluntary act, and that, this being so, the decisions under the previous act, that merely failing to file a voluntary petition is not such voluntary and intentional act in fraud of the statute, are applicable and decisive of the present case.

Arguments based on supposed differences between *permit* and *suffer* and *procure* are too uncertain on which to find that a great and important change in the theory of the bankrupt law was intended by Congress. Such an intention would have been directly and clearly expressed, and not left to uncertain inferences. That such inferences are uncertain plainly appears by the opposite conclusions reached, in respect to the meaning of the clauses in question, by the learned judges of the District and Circuit Courts. See *In re Moyer*, (93 Fed. Rep. 188;) *In re Thomas*, (103 Fed. Rep. 272;) *In re Nelson*, (98 Fed. Rep. 77;) *Duncan* v. *Landis*, (Cir. Ct. of Appeals for the Third Circuit.)

The case of *Pirie* v. *Chicago Title & Trust Company*, (182 U. S. 438,) the most recent decision of this court under the act of 1898, arose under another clause of the act, and is not directly applicable to the question we have here considered, but, so far as it has any bearing, sustains the views herein expressed. The question there was under sec. 60, and it was *held* that where a payment or transfer was made by an insolvent debtor, within four months prior to the filing of a petition in bankruptcy to a creditor who did not have cause to believe that an unlawful preference was intended, the creditor may keep the payment or transfer, even though the amount of such payment or transfer was thereby withdrawn from the administration of the bankrupt court and satisfaction in full was received by the creditor, but that if such payment was only a partial discharge of his debt, the creditor cannot prove, under the distribution in bankruptcy, for the balance of his debt, unless he first surrenders to the trustee the amount of the partial payment.

The conclusion warranted by the words of the statute, interpreted in this light of our previous decisions, is that the questions certified to us by the Circuit Court of Appeals should be answered in the negative.

The Chief Justice, Mr. Justice Brewer and Mr. Justice Peckham concur in this dissent.